(23,892)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 271.

ADAMS EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE CIRCUIT COURT OF WHITLEY COUNTY, STATE OF KENTUCKY.

INDEX.

	Original.	Print
Caption	a	1
Order filing indictment	1	1
Indictment	2	1
Summons and sheriff's return	4	2
Order setting case for trial	5	3
Judgment	6	3
Order setting aside judgment	7	4
Order noting an agreement as to an agreed state of facts	7	4
Order noting agreement as to making of the agreed state of facts part of the record in this case	8	5
An agreed statement of facts	9	5
Order filing motion for a peremptory instruction	12	7
Defendant's motion for a peremptory instruction	13	7
Order directing the official stenographic reporter to take down the testimony	15	8
Judgment	15	9
Order allowing official reporter's fees for taking down the testimony	16	9
Order filing defendant's motion and grounds for a new trial and overruling same	17	10
Motion and grounds for a new trial	18	10

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	Original.	Print
Petition for writ of error and assignment of error	20	12
Order filing bill of exceptions	23	13
Bill of exceptions	24	14
Stipulation as to facts	24	14
Motion to instruct jury to find defendant not guilty	27	16
Charge to the jury	28	17
Exceptions to charge	29	17
Judge's certificate to bill of exceptions	29	18
Supersedeas bond	30	18
Schedule or præcipe for record	34	21
Notice of filing schedule	35	21
Clerk's certificate	36	22
Writ of error	37	22
Citation	38	23
Acknowledgment of service of citation	39	23

a Pleas Before Honorable F. D. Sampson, Judge of the Whitley Circuit Court, in the 34th Judicial District in the State of Kentucky, at the February Term, 1913, of said Court, in Case No. 8904 of the Commonwealth of Kentucky, Plaintiff, Against Adams Express Company, Defendant, Then Pending in said Court, to-wit:

1 Whitley Circuit Court, February Term, 32nd Day, 25th Day of March, 1913.

Came the Grand Jury in open Court and answered to the call of their names and by their foreman in open court, in the presence of the Grand Jury, made the following report, to-wit:

COMMONWEALTH OF KENTUCKY
v.
ADAMS EXPRESS COMPANY.

B. L. in L. O. T.
Which indictment is endorsed a true bill and signed J. P. Campbell, Foreman of the Grand Jury, and is filed and ordered placed on this court's docket, and a summons ordered to issue for the defendant.

2 Whitley Circuit Court, February Term, 1913.

THE COMMONWEALTH OF KENTUCKY
against
ADAMS EXPRESS COMPANY.

Indictment.

The Grand Jury of Whitley County, In the name and by the authority of the Commonwealth of Kentucky, accuse Adams Express Company, a copartnership, of the offense of bringing into and delivering into local option territory, spirituous, vinous and malt liquors, committed in manner and form as follows, viz: The said Adams Express Company, a copartnership and association of individuals, the names of its members to the Grand Jury unknown, doing the business of a common carrier in this State, on the — day of ——, 191–, before the finding of this indictment and in the County and State aforesaid did unlawfully bring, transfer, deliver and distribute spirituous, vinous and malt liquors to John Horshaw in local option territory and contrary to the local option law which was then and there in force, the said witness, John Horshaw, not being a licensed druggist or physician and the said defendant not bringing the said liquor into the said territory as personal baggage or on his own person for his own private use in a quantity of not

less than one gallon, against the peace and dignity of the Commonwealth of Kentucky.

JOSEPH B. SNYDER,
Commonwealth's Attorney,
34th Judicial District of Kentucky.

Witnesses for Commonwealth
JOHN HORSHAW.

3 No. 8904. The Commonwealth of Kentucky vs. Adams Express Company. Indictment for Bringing liquor into local option territory. A true bill. J. P. Campbell, Foreman of Grand Jury. Presented by the foreman of the Grand Jury to the Court in the presence of the Grand Jury and received by me from the Court and filed in open court on the 25 day of March, 1913. L. P. Lay, Clerk. Bail, $—. Summon ——. Summons, copy and spa. iss. 3/26/13.

4 *Summons on Indictment.*

Whitley Circuit Court.

THE COMMONWEALTH OF KENTUCKY:

To any Sheriff, Coroner, Jailer, Constable, Marshal, or Policeman of this State:

You are hereby commanded to summon Adams Express Company, to appear in the Whitley Circuit Court on the 37 day of its present February Term to answer an indictment for bringing liquor into local option territory, found against it in said Court.

Given under my hand as Clerk of said Court this 26th day of March, 1913.

L. P. LAY, *Clerk.*

Summons the following witnesses for the Commonwealth: John Harshaw, to appear 37 day of Feb'y Term 1913.

L. P. LAY, *Clerk.*

March 26, 1913, executed the within summons on the Adams Express Company by giving a copy of same to R. M. Slater, their agent at Williamsburg, Ky.

C. W. RENFRO, *S. W. C.,*
By JAMES MURPHY, *D. S.*

5 *Orders.*

Whitley Circuit Court, February Term, 33rd Day, 26th Day of March, 1913.

B. L. in L. O. T.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS COMPANY, Defendant.

It is ordered by the court that indictments Numbered 8904 to 8922, inclusive, be and they are hereby set for trial on the 37th day of the present term of this court, and summons is ordered to issue for the defendant in each case, summoning the defendant to answer for trial on the 37th day of the present term of this court.

6 *Orders.*

Whitley Circuit Court, February Term, 37th Day, 31st Day of March, 1913.

8904.

B. L. into L. O. T'y.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS COMPANY, Defendant.

Came the attorney for the Commonwealth and the defendant having been duly served with process and failing to plead, the indictment is taken as true. Thereupon came the following jury, to-wit: H. A. Taylor, Crit Rhodes, Will Haun, K. C. Taylor, John Neal, Aaron Douglass, Andy Campbell, Charley Estes, J. M. Rains, J. S. Rowe, Anderson Hill and Taylor Cummins, who were duly sworn and after hearing the indictment read and the instructions of the court retired to their room for deliberation and afterward returned into court the following verdict, to-wit:

"We the jury do agree and find the defendant, Adams Express, guilty as charged in the indictment and fix its fine at $75.00 and cost.

J. S. ROWE, *Foreman.*"

It is therefore adjudged by the court that the plaintiff recover of the defendant, Adams Express Company, the sum of $75.00 and the cost of this prosecution, for which an execution may issue.

7 *Orders.*

Whitley Circuit Court, February Term, 40th Day, 3rd Day of April, 1913.

8904.

B. L. into L. O. T'y.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS COMPANY, Defendant.

By agrement of the parties to this action the judgment rendered herein on March 31, 1913, which was a former day of the present term of the court, for $75.00 is now and hereby set aside.

Whitley Circuit Court, February Term, 40th Day, 3rd Day of April, 1913.

B. L. into L. O. T'y.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS COMPANY, Defendant.

By agreement of plaintiff and defendant in nineteen cases styled as above and numbered from 8904 to 8922, both inclusive, pending in this court, each and all of said cases may be heard together by the same jury and considered on the agreed stipulation of facts this day entered into and signed by J. B. Snyder, Commonwealth's Attorney, and J. C. Bird, County Attorney, as attorneys for the Commonwealth, and by Maxwell & Ramsey and Tye & Siler, as attorneys for the defendant, Adams Express Company, and
8 filed herein, and the court may give one instruction to the jury to cover each and all of said cases, but the jury shall return a separate verdict and a separate judgment shall be entered in each case. It is agreed that all orders, motions, objections and exceptions made in this case shall apply and be considered having been made, entered and filed in each and all of said nineteen cases numbered from 8904 to 8922, both inclusive.

Whitley Circuit Court, February Term, 40th Day, 3rd Day of April, 1913.

B. L. into L. O. T'y.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS COMPANY, Defendant.

By agreement of Commonwealth of Kentucky, plaintiff, and Adams Express Company, defendant, the stipulation of facts this day signed by J. B. Snyder and J. C. Bird, attorneys for Commonwealth of Kentucky, and Maxwell and Ramsey and Tye & Siler, attorneys for defendant, Adams Express Company, is to be the stipulation of facts in each and all of the nineteen indictments numbered from 8904 to 8922, both inclusive, now pending in this court and said stipulation of facts thus signed is now filed and made a part of the record in each of said cases.

9 Whitley Circuit Court.

Indictments.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS COMPANY, Defendant.

Stipulation.

There being nineteen cases as above entitled, numbered from 8904 to 8922, both inclusive, pending in this court, in which defendant is indicted for the offense of bringing into and delivering into local option territory, spirituous, vinous and malt liquors, and whereas all such indictments charge that defendant did unlawfully bring, transfer, deliver and distribute said liquors to certain persons named in said indictments, respectively, in local option territory and contrary to the local option law which was then and there in force, it is hereby agreed and stipulated that the following facts shall be taken and considered as the evidence in said cases without further proof of the same;

1.

Adams Express Company is a co-partnership and association of individuals, the names of its members to the grand jury being unknown, doing business of a common carrier in the State of Kentucky.

2.

Said Adams Express Company is engaged in the business of a common carrier of goods and merchandise by express for hire, in,

between and throughout many states of the United States, and does business in Whitley County, Kentucky, and between said county and the cities of Jellico, in the State of Tennessee, and High Cliff, in the State of Tennessee.

10

3.

On the several dates named in said indictments Adams Express Company knowingly brought into, transferred, delivered and distributed certain spirituous liquors, to-wit: whiskey, in local option territory and where the local option law was in force, as charged in said indictments. Prior to the time of said bringing into, transferring, delivering and distributing said liquors the consignees of said liquors, being the persons named in said indictments, respectively, had sent orders by mail for said liquors to dealers at Jellico, in the State of Tennessee, and High Cliff, in the State of Tennessee, and had paid the purchase price of said liquors to said dealers at said places in Tennessee.

4.

That on the receipt of said orders said dealers at their respective places of business at Jellico, Tennessee, and High Cliff, Tennessee, for the purpose of filling said orders delivered to Adams Express Company at said places the several packages of liquor, directing said Adams Express Company to carry and deliver the same to the several persons named in said indictments, respectively.

5.

That thereupon Adams Express Company carried said packages of liquor from its offices at Jellico, Tennessee, and High Cliff, Tennessee, over its lines into Whitley County, Kentucky, and there delivered, and delivered the same to the consignees thereof, who were the same persons who had made said orders and to whom the indictments herein charge the defendant with delivering and distributing said liquors and the said transactions are the same and no other than those charged in said indictments.

6.

Said liquors were intended by said consignees, being the
11 persons named in said indictments as witnesses, respectively, for their personal use and were so used by them, and were not intended by them to be sold contrary to law, and were not so sold by them.

7.

Said consignees, being the persons named as witnesses in said indictments were not at the times referred to in this stipulation either druggists nor physicians.

8.

Said transactions and all of them occurred since the enactment and going into effect of the Act of Congress known as the Kenyon-Webb Law.

It is further stipulated and agreed that the foregoing facts shall be submitted to the jury and considered as the facts in all of said cases above numbered.

J. B. SNYDER,
J. C. BIRD,
Attorneys for Commonwealth of Kentucky.
MAXWELL & RAMSEY &
TYE & SILER,
Attorneys for Defendant Adams Express Company.

Com'lth of Ky. vs. Adams Express Co. Agreed Statement of Facts. April 3, 1913. Filed in open Court. Attest: L. P. Lay, Clerk.

12 Whitley Circuit Court, February Term, 40th Day, 3rd Day of April, 1913.

B. L. into L. O. T'y.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS COMPANY, Defendant.

The defendant's motion for a peremptory instruction and the grounds set out therein is now hereby filed in this case and by agreement of the parties to this action said motion for peremptory instruction and the grounds set out therein in writing in this case is now hereby adopted and made the motion for peremptory instruction in each and all of the other indictments and cases, numbered 8904 to 8922, both inclusive, and this motion for a peremptory instruction in this case and the grounds set out therein is made a part of the record in each and all of the other said cases now pending in this court wherein Commonwealth of Kentucky is plaintiff and Adams Express Company is defendant.

13 Whitley Circuit Court.

Indictments Nos. 8904 to 8922, Both Inclusive—19 Indictments in All.

COMMONWEALTH OF KENTUCKY, Plaintiff,
v.
ADAMS EXPRESS COMPANY, Defendant.

Defendant's Motion for Peremptory Instruction in Each Case.

Comes now the defendant, Adams Express Company, in each of the 19 cases above referred to, to-wit: indictments Nos. 8904 to 8922 both inclusive, at the conclusion of the testimony, and moves the court to direct a verdict of not guilty in each of said cases, because

the shipments of liquor were interstate shipments begun at Jellico, Tennessee, and High Cliff, Tennessee, and ended by delivery to the respective consignees in Whitley County, in the State of Kentucky, and constituted interstate commerce within the meaning of the clause in the Federal Constitution which gives to Congress the power to regulate commerce between the states; and, further, that section 2569*a* of the Kentucky Statutes to the extent that it is sought to be applied to such shipments and deliveries of liquor is void and in contravention of the commerce clause of the Federal Constitution above referred to; and, further, that said liquors being for the personal use of said consignees respectively, and because said section 2569*a* of the Kentucky Statutes is repugnant to the Constitution of Kentucky, and especially to section 59, sub-section 27, and to sections 61 and 154, and is also repugnant to the provisions of the 14th amendment of the Constitution of the United States to the effect that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws. If said indict-
14 ments are authorized under the Act of Congress known as the "Webb-Kenyon Law", defendant further moves the court to direct a verdict of not guilty in each case on the ground that said "Webb-Kenyon Law" is void and in contravention of the Interstate Commerce clause of the Constitution of the United States, and the 14th amendment of said Constitution, and of that part of the 5th amendment of said Constitution wherein it provides that "no person shall be deprived of life, liberty or property without due process of law."

TYE & SILER,
Attorneys for Defendant Adams Express Company.

Com'th of Kentucky, Pl'ff, v. Adams Express Co., Def't. Defendant's motion for peremptory instruction in each case. April 3, 1913. Filed in open Court. Attest: L. P. Lay, Clerk.

15 Whitley Circuit Court, February Term, 40th Day, 3rd Day of April, 1913.

8904.

B. L. into L. O. T'y.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS COMPANY, Defendant.

The defendant having this day in open court requested the services of the official reporter, it is now therefore ordered by the court that the said reporter make a full report of the testimony heard at the trial in this case.

Whitley Circuit Court, February Term, 40th Day, 3rd Day of April, 1913.

8904.

B. L. into L. O. T'y.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS COMPANY, Defendant.

Came the attorney for the Commonwealth and the defendant, by attorney, and both parties announced ready for trial, and thereupon came the following jury, to-wit:

H. A. Taylor, Crit Rhodes, Will Haun, K. C. Taylor, John Neal, Aaron Douglass, Andy Campbell, Charley Estes, J. M. Rains, J. S. Rowe, Anderson Hill and Taylor Cummins, and the defendant, by attorney, entered a plea of not guilty and the jury was then sworn to well and truly try the issue joined and a true verdict render
16 in this case, and after hearing the agreed statement of facts and instructions of the court, retired to their room for deliberation, and afterward returned into court the following verdict, to-wit:

"We the jury do agree and find the defendant, Adams Express, guilty as charged in the indictment, and fix its fine at $50.00 and cost.

J. S. ROWE, *Foreman.*"

It is therefore adjudged by the court that the plaintiff recover of the defendant, Adams Express Company, the sum of $50.00 and the cost of this prosecution, for which judgment an execution may issue.

Whitley Circuit Court, February Term, 40th Day, 3rd Day of April, 1913.

8904.

B. L. into L. O. T'y.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS COMPANY, Defendant.

The defendant having requested the services of Minnie Murphy, the official reporter of this court, upon the trial of this case, and the presiding judge having directed said reporter to make a full report of the testimony heard herein, and said reporter having served one day in making same, it is therefore now ordered that the fees of said reporter for making said report be and they are hereby fixed at

$5.00, which fees are hereby allowed to said reporter and directed to be forthwith paid by the defendant, Adams Express Company.

17 Whitley Circuit Court, February Term, 40th Day, 3rd Day of April, 1913.

8904.

B. L. into L. O. T'y.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS COMPANY, Defendant.

Came the defendant, Adams Express Company, and filed in the court its motion and grounds for a new trial, and the court being advised adjudges that said motion be and is now overruled, whereupon Adams Express Company, by its attorneys, presented and filed a petition for writ of error from the Supreme Court of the United States and assignment of errors thereon. It is hereby ordered that the writ is allowed to operate as a supersedeas on defendant giving bond payable to plaintiff, to be approved by the clerk for the payment, in case the judgment be affirmed, of the fine and costs and the cost of appeal and all damages thereon.

18 Whitley Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
v.
ADAMS EXPRESS COMPANY, Defendant.

Motion and Grounds for a New Trial.

The defendant, Adams Express Company, moves the court to set aside the verdict of the jury herein and the judgment of the court thereon and grant it a new trial for the following reasons and on the following grounds and errors of the court, to-wit:

1.

The court erred in overruling the motion of defendant, at the conclusion of the testimony, to direct a verdict of not guilty.

2.

The court erred in refusing to direct a verdict of not guilty and in holding that section 2569*a* of the Statutes of Kentucky applied to the transactions disclosed by the evidence.

3.

The court erred in refusing to hold that said section 2569*a* of the Kentucky Statutes is void as applied to this case and in con-

travention of the commerce clause of the Federal Constitution — of the Constitution of Kentucky and especially section 59, sub-section 27 27 and to sections 61 and 145 thereof and to the provisions of the Fourteenth Amendment of the Constitution of the United States.

4.

The court erred in refusing to charge the jury in regard to the application of said provisions of the Constitution of Kentucky
19 and of the Constitution of the United States and in regard to the Fifth Amendment of said Constitution of the United States, as requested by defendant in its said motion for peremptory instruction.

5.

The court misinstructed the jury.

6.

The court refused to instruct the jury properly.

7.

The verdict of the jury is against the law.

8.

The verdict of the jury is contrary to law.

9.

The verdict of the jury is against the evidence and is not supported by any evidence.

10.

The indictment does not state a public offense.

Wherefore, the defendant prays that the verdict of the jury and the judgment of the court thereon be vacated and that it be granted a new trial herein.

MAXWELL & RAMSEY &
TYE & SILER.
Attorneys for Defendant.

Commonwealth of Kentucky v. Adams Express Company. Motion and grounds for a new trial. April 3, 1913. Filed in open Court. Attest: L. P. Lay, Clerk.

20 Whitley Circuit Court, February Term, 40th Day, April 3rd, 1913.

No. 8904.

COMMONWEALTH OF KENTUCKY, Plaintiff,
v.
ADAMS EXPRESS COMPANY, Defendant.

Petition for Writ of Error and Assignment of Error.

To the Honorable Judge of the Circuit Court of Whitley County, Kentucky:

Adams Express Company prays a writ of error from the Supreme Court of the United States to review a final judgment in this court, rendered against your petitioner in the cause above entitled on the 3rd day of April, 1913, by the Whitley Circuit Court, Whitley County, Kentucky, that being the highest court of the state in which a decision in the suit could be had and assigns as error;

First.

That the transactions on account of which the Adams Express Company was indicted, and on account of which judgment was entered against said Adams Express Company constituted interstate commerce and were not subject to regulation by the State of Kentucky and that the statute of Kentucky, on which said indictment was based and prosecuted to judgment, is, as applied to said transactions, in conflict with the commerce clause of the Constitution of the United States.

Second.

That said liquors, on account of the transportation and delivery of which Adams Express Company was indicted and
21 judgment rendered against it, being for the personal use of the consignee thereof, said statute of Kentucky is repugnant to the provisions of the 14th amendment of the Constitution of the United States to the effect that "no state shall deprive any person of life, liberty or property without due process of law."

Third.

If said indictment and judgment are authorized by the Act of Congress of March 1st, 1913, known as the "Webb-Kenyon Law," said law is void and in contravention of the interstate commerce clause of the Constitution of the United States and the 14th amendment of said constitution and of that part of the 5th amendment of said constitution wherein it provides that "no person shall be deprived of life, liberty or property without due process of law."

Fourth.

That the court erred in overruling the motion of defendant to direct the jury to find defendant not guilty on the grounds set forth in said motion and in instructing the jury as follows:

"Gentlemen of the Jury:

1.

The County of Whitley is what is commonly known and called "local option territory" and it is and was at the times mentioned in this agreed statement of facts unlawful to sell, give or procure for or furnish to another any spirituous, vinous or malt liquors in Whitley County.

If you believe from the evidence that the defendant, Adams Express Company, as a common carrier, brought into Whitley County and there delivered to John Harshaw, the person named in the indictment, any spirituous, vinous or malt liquors, then you
22 find it guilty and fix its punishment at any fine not less than $50.00 or more than $100.00 in your discretion, according to the proof.

2.

If, upon the whole case, you have a reasonable doubt from the evidence of the defendant company having been proven guilty, then it is your duty to find it not guilty."

and in entering judgment against defendant, and in overruling defendant's motion for a new trial.

Adams Express Company therefore prays that the judgment of the Circuit Court of Whitley County, Kentucky, may be reversed.

ADAMS EXPRESS COMPANY,
By its Attorneys:
LAWRENCE MAXWELL.
JOSEPH S. GRAYDON.
A. T. SILER.
H. H. TYE.

No. 8904. Commonwealth of Kentucky v. Adams Express Company. Petition for writ of error and assignment of error. April 3, 1913. Filed in open Court. Attest: L. P. Lay, Clerk.

23 Whitley Circuit Court, February Term, 40th Day, 3rd Day of April, 1913.

B. L. into L. O. T'y.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS COMPANY, Defendant.

This day came the defendant, Adams Express Company, by attorney, who thereupon produced and filed its bill of exceptions

herein, and by agreement of the attorney for plaintiff in eighteen other cases styled as above and pending in this court, being numbered 8904 to 8922, both inclusive, also produced and filed its bill of exceptions in each of said eighteen cases and the bill of exceptions in this, as well as in each of the eighteen other cases, having been approved and signed by the judge who presided at the trial thereof, is hereby filed as part of the record in this case, and in each of the said eighteen other cases without being spread at large on the order book.

24 Whitley Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
v.
ADAMS EXPRESS COMPANY, Defendant.

Bill of Exceptions.

Be it remembered, that nineteen cases, styled as above, being numbered from 8904 to 8922, both inclusive, were tried by a jury in the Whitley Circuit Court under an agreed statement of facts made by and between the parties thereto as shown by a stipulation which is in words and figures as follows, to-wit:

"Whitley Circuit Court.

Indictments.

COMMONWEALTH OF KENTUCKY, Plaintiff,
v.
ADAMS EXPRESS COMPANY, Defendant.

Stipulation.

There being nineteen cases as above entitled, numbered from 8904 to 8922, both inclusive, pending in this court, in which defendant is indicted for the offense of bringing into and delivering into local option territory, spirituous, vinous and malt liquors, and whereas all such indictments charge that defendant did unlawfully bring, transfer, deliver and distribute said liquors to certain persons named in said indictments, respectively, in local option terri-
25 tory and contrary to the local option law which was then and there in force, it is hereby agreed and stipulated that the following facts shall be taken and considered as the evidence in said cases without further proof of the same;

1.

Adams Express Company is a co-partnership and association of individuals, the names of its members to the grand jury being unknown, doing business of a common carrier in the State of Kentucky.

2.

Said Adams Express Company is engaged in the business of a common carrier of goods and merchandise by express for hire, in, between and throughout many states of the United States, and does business in Whitley County, Kentucky, and between said county and the cities of Jellico, in the State of Tennessee, and High Cliff, in the State of Tennessee.

3.

On the several dates named in said indictments Adams Express Company knowingly brought into, transferred, delivered and distributed certain spirituous liquors, to-wit, whiskey, in local option territory and where the local option law was in force, as charged in said indictments. Prior to the time of said bringing into, transferring, delivering and distributing said liquors the consignees of said liquors, being the persons named in said indictments, respectively, had sent orders by mail for said liquors to dealers at Jellico, in the State of Tennessee, and High Cliff, in the State of Tennessee, and had paid the purchase price of said liquors to said dealers at said places in Tennessee.

4.

That on the receipt of said orders said dealers at their respective places of business at Jellico, Tennessee, and High Cliff, Tennessee, for the purpose of filling said orders delivered to Adams Express Company at said places the several packages of liquor, directing said Adams Express Company to carry and deliver the same
26 to the several persons named in said indictments, respectively.

5.

That thereupon Adams Express Company carried said packages of liquor from its offices at Jellico, Tennessee, and High Cliff, Tennessee, over its lines into Whitley County, Kentucky, and delivered the same to the consignees thereof, who were the same persons who had made said orders and to whom the indictments herein charge the defendant with delivering and distributing said liquors and the said transactions are the same and no other than those charged in said indictments.

6.

Said liquors were intended by said consignees, being the persons named in said indictments as witnesses, respectively, for their personal use and were so used by them, and were not intended by them to be sold contrary to law, and were not so sold by them.

7.

Said consignees being the persons named as witnesses in said indictments were not at the times referred to in this stipulation either druggists nor physicians.

8.

Said transactions and all of them occurred since the enactment and going into effect of the Act of Congress known as the Kenyon-Webb Law.

It is further stipulated and agreed that the foregoing facts shall be submitted to the jury and considered as the facts in all of said cases above numbered.

J. B. SNYDER,
J. C. BIRD,
Attorneys for Commonwealth of Kentucky.
MAXWELL & RAMSEY &
TYE & SILER,
Attorneys for Adams Express Company."

Be it further remembered, that this was all the testimony heard and considered by the jury at the trial in either of said cases, and that at the conclusion of the testimony for plaintiff
27 the defendant filed its written motion in each of said cases, asking the court to direct the jury to find it not guilty therein, which written motion is in words and figures as follows, to-wit:

"Whitley Circuit Court.

Indictments Nos. 8904 to 8922, Both Inclusive—19 Indictments in All.

COMMONWEALTH OF KENTUCKY, Plaintiff,
v.
ADAMS EXPRESS COMPANY, Defendant.

Defendant's Motion for Peremptory Instruction in Each Case.

Comes now the defendant, Adams Express Company, in each of the 19 cases above referred to, to-wit, indictments Nos. 8904 to 8922, both inclusive, at the conclusion of the testimony, and moves the court to direct a verdict of not guilty in each of said cases, because the shipments of liquor were interstate shipments begun at Jellico, Tennessee, and High Cliff, Tennessee, and ended by delivery to the respective consignees in Whitley County, in the State of Kentucky, and constituted interstate commerce within the meaning of the clause in the Federal Constitution which gives to Congress the power to regulate commerce between the states; and, further, that section 2569*a* of the Kentucky Statutes to the extent that it is sought to be applied to such shipments and deliveries of liquor is void and in contravention of the commerce clause of the Federal Constitution above referred to; and, further, that said liquors being for the personal use of said consignees respectively, and because said section 2569*a* of the Kentucky Statutes is repugnant to the Constitution of Kentucky, and especially to section 59, sub-section 27, and to

sections 61 and 164, and is also repugnant to the provisions
28 of the 14th amendment of the Constitution of the United States to the effect that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. If said indictments are authorized under the Act of Congress known as the "Webb-Kenyon Law," defendant further moves the court to direct a verdict of not guilty in each case on the ground that said "Webb-Kenyon Law" is void and in contravention of the interstate commerce clause of the Constitution of the United States, and the 14th amendment of said Constitution, and of that part of the 5th amendment of said Constitution wherein it provides that "no person shall be deprived of life, liberty or property without due process of law."

MAXWELL & RAMSEY &
TYE & SILER,
Attorneys for Defendant Adams Express Company."

To the giving of this instruction plaintiff, by attorney, objected, and the court after due consideration thereof and being advised overruled said motion, and refused to instruct the jury as requested, to which action and ruling of the court defendant excepted at the time.

At the conclusion of the testimony heard at the trial, and after the court had refused to instruct the jury as requested by defendant, the court, on its own motion, gave the jury each of the following instructions, to-wit:

"Whitley Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
v.
ADAMS EXPRESS COMPANY, Defendant.

Instructions.

Gentlemen of the Jury:

1.

The County of Whitley is what is commonly known and
29 called "local option territory," and it is, and was at the times mentioned in this agreed statement of facts, unlawful to sell, give or procure for or furnish to another any spirituous, vinous or malt liquors in Whitley County.

If you believe from the evidence that the defendant, Adams Express Company, as a common carrier brought into Whitley County and there delivered to John Harshaw, the person named in the indictment, any spirituous, vinous or malt liquors, then you will find it guilty and fix its punishment at any fine not less than fifty dollars

nor more than one hundred dollars, in your discretion according to the proof.

2.

If upon the whole case you have a reasonable doubt from the evidence of the defendant Company having been proven guilty, then it is your duty to find it not guilty."

To the giving of the foregoing instructions 1 and 2, and to the giving of each or any thereof, the defendant objected, but its objection was overruled by the court and each of the instructions given, to which action and ruling of the court the defendant excepted at the time. That the foregoing instructions are all that were asked for, given or refused.

Then came the defendant and tendered this as its bill of exceptions herein, which, being examined, is hereby approved and signed by the Judge before whom the trial was had.

F. D. SAMPSON,
Judge, Whitley Circuit Court.

April 3, 1913. Filed in open Court. Attest: L. P. Lay, Clerk.

30 *Supersedeas Bond.*

Whitley Circuit Court.

Case No. 8904.

ADAMS EXPRESS COMPANY, Appellant,
against
COMMONWEALTH OF KENTUCKY, Appellee.

Upon an Appeal from a Judgment of the Whitley Circuit Court Rendered 3rd Day of April, 1913.

Whereas, said appellant, Adams Express Company has prayed an appeal from the judgment of the Whitley Circuit Court, rendered at its February Term, 1913, against it in favor of the Appellee, Commonwealth of Kentucky for the sum of ($50.00) Fifty Dollars and the cost of the prosecution, and the Appellant desire- to supersede the said judgment above mentioned:

Now, we, Adams Express Company and American Surety Company of New York, surety, do hereby covenant to and with the Appellee, Commonwealth of Kentucky, that the Appellant will pay to the appellee all costs and damages that may be adjudged against the Appellant on the Appeal, and also that they will satisfy and perform the said Judgment above stated in case it shall be affirmed, and any Judgment or Order which the United States Supreme Court for the United States of America may render, or order to be rendered,

by the inferior court, not exceeding in amount or value the said Judgment aforesaid.

Witness our hands, this 8 day of April, 1913.

ADAMS EXPRESS COMPANY,
By A. T. SILER, *Att'y.*
AMERICAN SURETY COMPANY OF NEW YORK,
By A. T. SILER,
Attorney in Fact as per Authority Hereto Attached.

Attest:
L. P. LAY, *Clerk.*

Filed 8th day of April, 1913.

31 American Surety Company of New York.

Capital and Surplus Over $6,000,000.

Limited Power of Attorney.

Know all men by these presents:

That the American Surety Company of New York, a corporation of the State of New York, of No. 100 Broadway, in the City of New York, in said State, has made, constituted and appointed, and by these presents does hereby make, constitute and appoint A. T. Siler, of Williamsburg, Whitley County, Kentucky; or H. H. Tye, of Williamsburg, Whitley County, Kentucky, its true, sufficient and lawful attorney, with full power and authority to make, execute and deliver, for it, in its name and in its behalf, as surety, a bond or undertaking, as follows:

Before the Circuit Court, Whitley County, Kentucky, In re: Commonwealth of Kentucky versus the Adams Express Company, being a removal bond on behalf of the said Adams Express Company to remove the above entitled action from a judgment rendered against the said Adams Express Company in the amount of Fifty ($50.00) Dollars, from the Circuit Court, Whitley County, Kentucky, to the United States Supreme Court for the United States of America, said removal bond to cover the judgment with interest and costs.

hereby giving its said attorney full power and authority to do everything whatsoever requisite and necessary to be done for the purpose of making, executing and delivering such obligations as fully as the officers of said American Surety Company of New York could do if personally present, and hereby ratifying and confirming all that its said attorney shall lawfully do or cause to be done by virtue hereof, but reserving to itself full power of substitution and revocation.

In witness whereof, the said American Surety Company of New York has caused its corporate seal to be hereunto affixed and these

presents to be duly executed by its proper officers at the City
32 of Cincinnati, State of Ohio, on this seventh day of April, A. D. 1913.

AMERICAN SURETY COMPANY OF NEW YORK,
By HOWARD ECKER,
Resident Vice-President.

Attest:
[SEAL.] FRED J. KINSEY,
Resident Assistant Secretary.

At a regular meeting of the Executive Committee of the Board of Trustees of the American Surety Company of New York, held at the office of the Company at No. 100 Broadway, in the City of New York, on the seventeenth day of September, 1912, the following resolution was adopted:

"Resolved, That one of the Resident Vice Presidents, and one of the Resident Assistant Secretaries of this Company at Cincinnati, in the State of Ohio, be and they hereby are authorized and empowered to make, execute and deliver, in behalf of the Company, unto such person or persons in the States of West Virginia, Kentucky and Ohio as they may select, its power of attorney constituting and appointing each such person its Attorney in Fact, with full power and authority to make, execute and deliver, for it, in its name and in its behalf, as surety, any particular bond or undertaking that may be required in the said States of West Virginia, Kentucky and Ohio, the nature of such bond or undertaking to be in each instance specified in such power of attorney."

STATE OF NEW YORK,
County of New York, ss:

I, H. A. Reiss, Assistant Secretary of the American Surety Company of New York, hereby certify that I have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the Company at the City of New York, this 21st day of October, 1912.

[SEAL.] H. A. REISS,
Assistant Secretary.

33 STATE OF OHIO,
County of Hamilton, ss:

On this day personally appeared before me, a Notary Public, in and for the County aforesaid, Howard Ecker, and Fred J. Kinsey, who, being duly sworn by me, did depose any say that they are respectively a Resident Vice-President and a Resident Assistant Secretary, at the City of Cincinnati, of the American Surety Company of New York; and they, as such Resident Vice-President and Resident Assistant Secretary, respectively, did thereupon acknowl-

edge and deliver the foregoing instrument of writing as and for the act and deed of the American Surety Company of New York.

Witness my hand and seal, this seventh day of April, 1913.

[SEAL.] CHAS. T. WILLIAMS,
Notary Public in and for Hamilton County, Ohio.

34 Whitley Circuit Court.

Case No. 8904.

COMMONWEALTH OF KENTUCKY, Plaintiff,
v.
ADAMS EXPRESS COMPANY, Defendant.

Schedule.

The Clerk of the Whitley Circuit Court is hereby authorized and directed to copy into a transcript for the United States Supreme Court for the United States of America the entire record in this case, styled as above, and being numbered 8904, lately pending in the Whitley Circuit Court.

MAXWELL & RAMSEY AND
TYE & SILER,
Attorneys for Defendant.

Commonwealth of Kentucky v. Adams Express Company. Case No. 8904. Schedule. April 8, 1913. Filed in the Clerk's Office of the Whitley Circuit Court. Attest: L. P. Lay, Clerk.

35 Whitley Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
v.
ADAMS EXPRESS COMPANY, Defendant.

Notice of Fling Schedule in Case No. 8904.

The plaintiff, Commonwealth of Kentucky, is hereby notified that the defendant, Adams Express Company, has on this the 8th day of April, 1913, filed in the clerk's office of the Whitley Circuit Court schedule directing the clerk of that court to copy the entire record in this case, styled as above and numbered 8904, lately pending in the Whitley Circuit Court, into a transcript for the United States Supreme Court for the United States of America.

MAXWELL & RAMSEY AND
TYE & SILER,
Attorneys for Defendant.

We accept service of the above and foregoing notice of filing schedule, copy thereof being this day delivered to each of us as attorney for plaintiff in the above styled case, numbered 8904.

This the 8th day of April, 1913.

J. C. BIRD,
County Attorney for Whitley County.
J. B. SNYDER,
Commonwealth Attorney for the 34th Judicial District of Kentucky.

April 8, 1913. Filed in the Clerk's Office of the Whitley Circuit Court. Attest: L. P. Lay, Clerk.

36 STATE OF KENTUCKY,
County of Whitley, sct:

I, L. P. Lay, Clerk of the Circuit Court for the County and State aforesaid, do hereby certify that the foregoing 35 pages of typewritten matter is a true and correct copy of the entire record in case No. 8904 of the Commonwealth of Kentucky, Plaintiff, against Adams Express Company, Defendant, in the Whitley Circuit Court as same appears of record and remains on file in my office.

Witness my hand and seal of office this 12th day of April, 1913.

[Seal Whitley Circuit Court, State of Kentucky.]

L. P. LAY,
Clerk Whitley Circuit Court.

Clerk's fee for making this transcript $8.12.

37 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the Circuit Court of Whitley County, Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Whitley County, Kentucky before you, or some of you, between The Commonwealth of Kentucky, plaintiff, and Adams Express Company, defendant, a manifest error hath happened, to the great damage of the said Adams Express Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within — days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 4th day of April, in the year of our Lord one thousand nine hundred and thirteen.

[Seal U. S. District Court, Eastern District of Ky., U. S. of America.]

J. W. MENZIES, *Clerk,*
J. O. HASKEN,
Deputy Clerk of the District Court of the United States for the Eastern District of Kentucky.

Allowed by

F. D. SAMPSON,
Sole Judge of the Whitley Circuit Court, Commonwealth of Kentucky,

38 UNITED STATES OF AMERICA, *ss:*

To the Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of Whitley County, Kentucky, wherein Adams Express Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable F. D. Sampson, sole Judge of the Circuit Court of Whitley County, Kentucky, this 8th day of April, in the year of our Lord one thousand nine hundred and 13.

F. D. SAMPSON,
Sole Judge of the Whitley Circuit Court, Kentucky.

39 [Endorsed:] May 3, 1913. Service of the foregoing citation acknowledged. James B. McCreary, Governor of Kentucky; James Garnett, Attorney General of Kentucky.

Endorsed on cover: File No. 23,892. Kentucky, Whitley County, Circuit Court. Term No. 271. Adams Express Company, plaintiff in error, vs. The Commonwealth of Kentucky. Filed October 11th, 1913. File No. 23,892.

INDEX.

Page.

Statement of the case 1

Evidence contained in agreed statement of facts 3

Charge to the jury 5

Assignments of error 7

The law as to interstate shipments of liquors prior to the Webb-Kenyon Law 8

Constitutional right of a citizen of Kentucky to possess and use intoxicating liquors 10

Cases in the Court of Appeals of Kentucky upholding this right 11

Cases in other states 12

The Webb-Kenyon Law does not authorize the application of a state statute to an interstate shipment for lawful, personal use 16

Purpose of the law as shown by debates in Congress 18

Cases in the Court of Appeals of Kentucky and other courts so holding 22

Conflicting opinions on the subject, involving the West Virginia law; appeals pending here 41

Cases involving imported liquors intended to be used in violation of law distinguished. 42

The Webb-Kenyon Law, as construed and applied by the lower court, would be unconstitutional. .. 48

CASES.

Page.

Adams Express Company vs. Kentucky, 214 U. S. 218 7
Adams Express Company vs. Commonwealth, 154 Ky. 462.....
8, 11, 22, 46, 48
Adams Express Company vs. Commonwealth, 160 Ky. 66 ....17, 26
Adams Express Company vs. Crigler, 161 Ky. 89 21
Adams Express Company vs. West Virginia (pending in Supreme
Court of Appeals of West Virginia) 48
American Express Company vs. Beer, 65 Sou. 575 46
Anderson Net & Twine Co. vs. Worthington, 141 U. S. 468..... 18
Atkinson vs. Southern Express Co., 94 S. C. 44 45
Bristol Distributing Co. vs. Southern Express Co. (Supreme Court
of Appeals of Virginia, unreported) 37
Calhoun vs. Commonwealth, 154 Ky. 70 11
Clark Distilling Co. vs. American Express Co., 219 Fed. 339.39, 41, 42
Clark Distilling Co. vs. Western Maryland Railway Co., 219 Fed.
333 .....39, 41, 42
Commonwealth vs. Campbell, 133 Ky. 50 11
Commonwealth vs. Smith, 163 Ky. 227 12
Delaware vs. Grier, 88 Atl. 579 .....27, 46
Downes vs. Bidwell, 182 U. S. 244 18
Dunlap vs. United States, 173 U. S. 65 18
Eidge vs. Bessemer, 164 Ala. 599 12
Hamm Brewing Co. vs. Chicago, R. I. & P. Ry. Co., 215 Fed. 672..32
Holy Trinity Church vs. United States, 143 U. S. 457 18
Iowa vs. United States Express Co., 145 N. W. 451 42
Johnson vs. Southern Pacific Ry. Co., 196 U. S. 19 18
Kansas vs. Doe, 92 Kan. 212 44
Kirmeyer vs. Kansas, 236 U. S. 10
Louisville & Nashville Railroad Co. vs. Cook Brewing Co., 223
U. S. 70 9
Martin vs. Commonwealth, 153 Ky. 784 11
North Carolina vs. Cardwell, 166 N. C. 308 45
North Carolina vs. Williams, 146 N. C. 618 12
Palmer vs. Southern Express Co., 165 S. W. 236 .....31, 46
Peede, Ex parte, 170 S. W. 749 33
Rahrer, In re, 140 U. S. 155 49
Rhodes vs. Iowa, 170 U. S. 412 48
Smith vs. Southern Express Co., 82 S. E. 15 44
Southern Express Co. vs. Alabama, 66 Sou. 115 35
Southern Express Co. vs. City of High Point, 83 S. E. 254 36

Page.
United States, Ex rel vs. Oregon Navigation Co., 210 Fed. 378 .. 46
Vance vs. Vandercook (1). 170 U. S. 439 15
VanWinkle vs. State, 91 Atl. 385 .....16, 17, 27, 46
West Virginia vs. Adams Express Co., 219 Fed. 331 38
West Virginia vs. Adams Express Co. (C. C. A.), 219 Fed. 794....
17, 38, 41, 47

TEXTS.

Committee on Judiciary hearings, January 11, 1912 .....18, 19
Congressional Record 20, 21
Freund on Police Power, Sec. 453 13
Kentucky Criminal Code, Sec. 347 6
Kentucky Statutes, Sec. 2569 a 1
Webb-Kenyon Law 16

No. 271.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1914.

Adams Express Company, Plaintiff in Error,

vs.

Commonwealth of Kentucky.

Error to the Circuit Court of Whitley County, Kentucky.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The grand jury of Whitley County, Kentucky, on March 25, 1913, returned nineteen indictments, Nos. 8904 to 8922 inclusive, on the docket of that court, charging Adams Express Company with a violation of Section 2569 a, Kentucky Statutes, which provides:

> "1. **Unlawful to carry liquor into prohibited territory—persons exempt from act.** It shall be unlawful for any person or persons, individual or corporation, public or private carrier to bring into, transfer to other person or persons, corporations, carrier or agent, deliver or distribute, in any county, district, precinct, town or city, where the sale of intoxicating liquors

has been prohibited, or may be prohibited, whether by special act of the General Assembly, or by vote of the people under the local option law, any spirituous, vinous, malt or other intoxicating liquor, regardless of the name by which it may be called; and this act shall apply to all packages of such intoxicating liquors whether broken or unbroken.

Provided, individuals may bring into such district, upon their person or as their personal baggage, and for their private use, such liquors in quantity not to exceed one gallon: And, provided, The provisions of this act shall not apply to licensed physicians or druggists, to whom any public carrier may deliver such goods, in unbroken packages, in quantity not to exceed five gallons at any one time.

2. **Each package separate offense.** Each package of such spirituous, vinous, malt or other intoxicating liquor, regardless of the name by which it may be called, whether broken or unbroken packages, brought into and transferred to other person, corporation, carrier or agent, delivered or distributed in such local option territory, shall constitute a separate offense.

3. **Penalties.** Any person or persons, individual or corporation, public or private carrier violating the provisions of this act shall be deemed guilty of violating the local option law and shall be fined not less than fifty nor more than one hundred dollars for each offense.

4. **Place of delivery— act only applies to common carriers.** And the place of delivery of

such liquors shall be held to be the place of sale: Provided further, That the provisions of this act shall only apply to common carriers, corporations, firms or individuals who usually carry freight or goods for hire; and every firm, common carrier, corporation or individual who receives pay for conveying vinous, malt or spirituous liquors shall be deemed a violator of the provisions hereof.

5. **Repealing clause.** And all laws in conflict with this act are hereby repealed. (This section is an act of March 21, 1906)."

The indictment in this case, No. 8904, in the court below (R. 1), charged that Adams Express Company, a co-partnership did unlawfully bring, transfer, deliver and distribute spirituous liquors in local option territory in Whitley County to one John Horshaw.

Pleas of not guilty were filed (R. 9) and a stipulation was made (R. 4) that all the cases should be tried together on an agreed statement of facts, that the court should give one charge to the jury to cover all the cases, that all orders, motions, objections and exceptions should apply to each of the cases, and that a separate verdict and judgment should be rendered in each case. The agreed statement of facts (R. 5) shows;

The intoxicating liquors that the express company, a common carrier was indicted for carrying into and delivering in local option territory in Kentucky were carried in the usual course of business from the cities of Jellico and High Cliff in the State of Tennessee, at which places they were received by the carrier for ship-

ment to the consignees. The liquors had theretofore been purchased by the consignees at the places in Tennessee from which they were shipped, and the purchase price had been paid by the consignees to the sellers and consignors of the liquor at Jellico and High Cliff, Tennessee, before the liquors were delivered to the carrier. The liquors were delivered in local option territory in Whitley County to the persons named as consignees, being the same persons in each case respectively who had purchased the liquors and paid the sellers for them in Tennessee. The liquors were intended by the consignees, for their personal use, and were so used by them, and were not intended by them to be sold contrary to law, and were not so sold by them. All the transactions occurred after the going into effect of the act of Congress of March 1, 1913, known as the Webb-Kenyon Law.

At the close of the evidence the company filed the following written grounds for a peremptory instruction in its favor (R. 7):

> "Because the shipments of liquor were interstate shipments begun at Jellico, Tennessee, and High Cliff, Tennessee, and ended by delivery to the respective consignees in Whitley County, in the State of Kentucky, and constituted interstate commerce within the meaning of the clause in the Federal Constitution, which gives to Congress the power to regulate commerce between the states; and, further, that Section 2569 a of the Kentucky Statutes to the extent that it is sought to be applied to such

shipments and deliveries of liquor is void and in contravention of the commerce clause of the Federal Constitution above referred to; and, further, that said liquors being for the personal use of said consignees respectively, and because said Section 2569 a of the Kentucky Statutes is repugnant to the Constitution of Kentucky, and especially to section 59, sub-section 27, and to Sections 61 and 154, and is also repugnant to the provisions of the 14th amendment of the Constitution of the United States to the effect that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws. If said indictments are authorized under the Act of Congress known as the 'Webb-Kenyon Law,' defendant further moves the court to direct a verdict of not guilty in each case on the ground that said 'Webb-Kenyon Law' is void and in contravention of the Interstate Commerce Clause of the Constitution of the United States, and the 14th Amendment of said Constitution, and of that part of the 5th amendment of said Constitution wherein it provides that 'no person shall be deprived of life, liberty or property without due process of law.'"

The court overruled the motion and refused to instruct the jury as requested, to which defendant excepted (R. 17).

The court, over defendant's objection, instructed the jury as follows (R. 17):

"Gentlemen of the Jury: The County of

Whitley is what is commonly known and called 'local option territory,' and it is, and was at the times mentioned in this agreed statement of facts, unlawful to sell, give or procure for or furnish to another any spirituous, vinous or malt liquors in Whitley County.

If you believe from the evidence that the defendant, Adams Express Company, as a common carrier, brought into Whitley County and there delivered to the person named in the indictment, any spirituous, vinous or malt liquors, then you will find it guilty and fix its punishment at any fine not less than fifty dollars nor more than one hundred dollars, in your discretion according to the proof.

If, upon the whole case, you have a reasonable doubt from the evidence of the defendant company having been proven guilty, then it is your duty to find it not guilty."

The jury returned a verdict of guilty and assessed a fine of $50.00 (R. 9), for which amount judgment was entered (R. 9). A motion for a new trial was filed and overruled (R. 10). The fine of $50.00 was insufficient to permit an appeal to the Court of Appeals under Section 347 of the Criminal Code (1913 edition, p. 599), which provides:

"The Court of Appeals shall have appellate jurisdiction in penal actions and prosecutions for misdemeanors, in the following cases only, viz: If the judgment be for a fine exceeding fifty dollars, or for imprisonment exceeding thirty days; or, if the judgment be for the de-

fendant, in cases in which a fine exceeding fifty dollars, or confinement exceeding thirty days, might have been inflicted."

Whitley Circuit Court, therefore, being the highest court in the state in which a decision could be had, the writ of error is directed to that court, which is the same procedure as was followed in Adams Express Company vs. Kentucky, 214 U. S. 218.

Errors Relied On.

The assignment of errors apears at R. 12. We contend that the transactions shown in evidence constituted interstate commerce within the meaning of the commerce clause of the constitution, and that the Kentucky statute as applied to these transactions is null and void. That the Act of Congress of March 1, 1913, known as the Webb-Kenyon Law has no application because the liquors were not intended for illegal use: that if the Webb-Kenyon Law does apply, or if it permits the Kentucky Statute to apply, the Webb-Kenyon Law is in contravention of the commerce clause and of the fifth amendment. These questions were raised and relied on in the court below by the stipulation of evidence (R. 5); the motion for a peremptory instruction (R. 7), and the motion for a new trial (R. 11).

ARGUMENT.

I.

The Law as to Interstate Shipments of Liquors prior to the Webb-Kenyon Law.

The transactions disclosed in evidence constituted interstate commerce to which the Kentucky Statute could have no application prior to the taking effect of the Webb-Kenyon Law.

In one of the cases tried with this case in Whitley Circuit Court a fine of $100.00 was assessed. The judgment was reversed by the Court of Appeals in Adams Express Company vs. Commonwealth, 154 Ky. 462, where it was said, at p. 465:

> "At the outset it is agreed by counsel for the Commonwealth that, except for the enactment of the Congressional legislation known as the Webb-Kenyon Law, the express company, as a common carrier, could not be punished under Section 2569 a of our statute for carrying intoxicating liquor from a point in Tennessee into territory in this state in which the sale of such liquor is prohibited by law and delivering it under the circumstances set out in the agreed statement of facts, as this statute was expressly declared by the Supreme Court of the United States in Louisville and Nashville Railroad Company vs. Cook Brewing Company, 223 U. S. 70, to be inoperative when attempted to be applied to interstate shipments of intoxicating liquor,

although it was and is effective in its application to intrastate shipments of such liquor."

The law on the subject was summarized in the opinion delivered by Mr. Justice Lurton in Louisville & Nashville Railroad Co. vs. Cook Brewing Co., 223 U. S. 70, in the following language:

"By a long line of decisions, beginning even prior to Leisy vs. Hardin, 135 U. S. 100, it has been indisputably determined;

a. That beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce.

b. That it is not competent for any state to forbid any common carrier to transport such articles from a consignor in one state to a consignee in another.

c. That until such transaction is concluded by delivery to the consignee, such commodities do not become subject to state regulation, restraining their sale or disposition.

The Wilson Act, which subjects such liquors to state regulation, although still in the original packages, does not apply before actual delivery to such consignee where the shipment is interstate. Some of the many later cases in which these matters have been so determined and the Wilson Act construed are: Rhodes vs. Iowa, 170 U. S. 412; Vance vs. Vandercook Co., 170 U. S. 438; Heyman vs. Southern Railway, 203 U. S. 270; Adams Express Co. vs. Kentucky, 214 U. S. 218.

Valid as the Kentucky legislation undoubtedly was as a regulation in respect to intrastate

shipments of such articles, it was most obviously never an effective enactment in so far as it undertook to regulate interstate shipments to dry points. Pending this very litigation, the Kentucky Court of Appeals, upon the authority of the line of cases above cited, reached the same conclusion. C. N. O. & T. P. Ry. vs. Commonwealth, 126 Ky. 563.

The obligation of the railway company to conform to the requirements of the Kentucky law, so far as that law prohibited intrastate shipments, is clear, and to this extent its circular notification was commendable. But the duty of this company, as an interstate common carrier for hire, to receive for transportation to consignees upon its line in Kentucky from consignors in other states any commodity which is an ordinary subject of interstate commerce, and such transportation, could not be prohibited by any law of the state of such consignee, inasmuch as any such law would be an unlawful regulation of interstate commerce not authorized by the police power of the state."

These principles were re-affirmed in Kirmeyer vs. Kansas, decided at this term.

II.

A citizen of Kentucky has the Constitutional Right to use Intoxicating Liquors and to receive and possess them for that purpose.

Without discussing the question whether the right to drink intoxicating liquors is one which is protected

by the 14th amendment of the Federal Constitution, or whether the right to purchase liquors in another state for personal use and to receive them in interstate commerce is a right protected by the commerce clause, it is probably sufficient for the purposes of this argument to show that the right to use, and have in possession for use, intoxicating liquors, is one that is guaranteed by the constitution of Kentucky and recognized by the statutes of Kentucky.

The courts of Kentucky do not base this right of the citizen on any particular provision of the constitution, so much as upon the broad ground that it is not a function of government in a free people to prohibit the citizen the right of owning or drinking liquor. In Adams Express Co. vs. Commonwealth, 154 Ky. at 471, the court, after citing Calhoun vs. Commonwealth, 154 Ky. 70, and Martin vs. Commonwealth, 153 Ky. 784, quoted the following language from Commonwealth vs. Campbell, 133 Ky. 50:

> "The history of our state from its beginning shows that there was never even the claim of a right on the part of the legislature to interfere with the citizen using liquor for his own comfort, provided that in so doing he committed no offense against public decency by being intoxicated; and we are of opinion that it never has been within the competency of the legislature to so restrict the liberty of a citizen, and certainly not since the adoption of the present constitution. The Bill of Rights, which declares that among the inalienable rights possessed by

> the citizens is that of seeking and pursuing their safety and happiness, and that the absolute and arbitrary power over the lives, liberty, and property of freeman exists nowhere in a republic, not even in the largest majority, would be but an empty sound if the legislature could prohibit the citizen the right of owning or drinking liquor, when in so doing he did not offend the laws of decency by being intoxicated in public. . . . Therefore, the question of what a man will drink, or eat, or own, provided the rights of others are not invaded, is one which addresses itself alone to the will of the citizen. It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty, the exercise of which will not directly injure society."

The same rule is laid down in State vs. Williams, 146 N. C. 618, 61 S. E. 61; Eidge vs. Bessemer, 164 Ala. 599, 51 Sou. 246 and State vs. Gilman, 33 W. Va. 146. In the case last cited the opinion at p. 151 states:

> "Upon the whole case, it seems to me plain, that that part of said statute which inhibits a person 'to keep in his possession, for another, spirituous liquors,' etc., is in conflict with both the federal and state constitutions, and therefore void."

In Commonwealth vs. Smith, 163 Ky. 227, these principles were reaffirmed by the Court of Appeals, holding unconstitutional a part of an act of the legis-

lature, approved March 9, 1914, entitled, "An Act prohibiting the shipment of liquors for sale in local option territory and prohibiting persons from having in possession for sale liquors in such territory." The decision of the court as shown by the second syllabus was that;

> "Section 4 . . . providing that in prohibited territory it shall be unlawful for any person to 'keep, store or possess any such liquors in any room, building, or structure other than the private residence of such person,' was unconstitutional as exceeding the authority of the legislature by prohibiting the possession of liquors for an innocent purpose with which the police power of the state is not concerned."

The court, after referring to previous decisions of its own, quotes the following from Freund on Police Power, Sections 453, 454:

> "Even the advocates of prohibition concede that the State has no concern with the private use of liquor. The opponents of prohibition mistake the case by saying that the State has no right to declare what a man shall eat or drink. The State does not venture to make any such declaration. . . . It is not the private appetite or home customs of the citizen that the State undertakes to manage, but the liquor traffic. . . . If, by abolishing the saloon, the State makes it difficult for men to gratify their private appetites, there is no just reason for complaint. . . . It is, therefore, significant that the policy of prohibition stops short of dealing with the private act of consumption."

At p. 234 the court uses the following language:

> "The power of a State to regulate and control the conduct of a private individual is confined to those cases where his conduct injuriously affects others. With his faults or weaknesses which he keeps to himself, and which do not operate to the detriment of others, the State as such has no concern. In other words, the police power may be called into play when it is reasonably necessary to protect the public health or public morals or public safety. The mere fact that the legislature sees fit to enact a statute ostensibly for the purpose of promoting such ends is not conclusive of the question. When, therefore, the statute purporting to have been enacted to protect the public health or public morals or public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court so to adjudge, and thereby give effect to the Constitution. State vs. Williams, supra; Mugler vs. Kansas, 123 U. S. 623, 31 L. Ed., 205. We have in force a statute prohibiting the possession of intoxicating liquor in prohibited territory for the purpose of sale. Under this statute very slight evidence is sufficient to secure a conviction. Where, therefore, the purpose of the owner is unlawful, the above statute is effective. Here it is sought to go one step further and make the possession for an innocent purpose considered from the standpoint of the police power as much of an offense as if the possession were for an unlawful purpose. Manifestly, if

the legislature has the power to prohibit such possession at places other than one's private residence, then it has the like power to prohibit such possession even at a private residence, and this is exactly what was held in Commonwealth vs. Campbell, supra, could not be done. There must of necessity be limits beyond which the legislature cannot rightfully go. We think that limit is reached when it prohibits such possession for sale or other unlawful purpose. It cannot go further and prohibit such possession or limit the place of possession where the liquors are intended for one's own use, and, therefore, for a purpose with which the police power of the State is not concerned. It will not do to say that because some persons may evade the law as it now exists, others who have no intention of violating the law should be denied their constitutional rights. As this is the effect of Section 4 of the act in question, we concur in the ruling of the circuit judge that the section is unconstitutional and void."

In this connection the language of Mr. Justice White delivering the opinion in Vance vs. Vandercook (1), 170 U. S. 439 (1898), is important. At p. 455 he said:

"On the face of these regulations, it is clear that they subject the constitutional right of the non-resident to ship into the state and of the resident in the state to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges. The

right of the citizen of another state to avail himself of interstate commerce cannot be held to be subject to the issuing of a certificate by an officer of the state of South Carolina, without admitting the power of that officer to control the exercise of the right. But the right arises from the constitution of the United States; it exists wholly independent of the will of either the law-making or the executive power of the state; it takes its origin outside of the state of South Carolina, and finds its support in the Constitution of the United States."

III.

The Webb-Kenyon Law does not authorize the application of a state statute to an Interstate Shipment for lawful, personal use.

The law, after having been returned to the Senate by President Taft, with objections thereto, was enacted March 1, 1913, as Ch. 90, 37 Stat. 699. The opinion of the Supreme Court of Delaware in VanWinkle vs. State, 27 Del., 91 Atl. 385 (June 16, 1914), gives the history of the law during its consideration by Congress. It reads:

> An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases.
>
> "Be it enacted, etc., that the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place non-contiguous to

but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

The United States Circuit Court of Appeals for the Fourth Circuit in State of West Virginia vs. Adams Express Company, 219 Fed. 794 (decided January 13, 1915), considered it so clear that under the Webb-Kenyon Law a state had power to prohibit the interstate transportation of liquors for personal use, that the interpretation of the law permitted no resort to extraneous sources. On the other hand, the Supreme Court of Delaware in VanWinkle vs. State, 91 Atl. 385, did not consider it proper to refer to the debates in Congress, because the law was so clear the other way. In Adams Express Company vs. Commonwealth, 160 Ky. 66, 169 S. W. 603 (October 6, 1914), the Court of Appeals of Kentucky referred to the debates as a proper source of information in construing the law.

This difference of opinion justifies us in calling the attention of the court to what was said in Congress on the subject of shipments for personal use.

If there is any doubt as to the construction or application of a statute, contemporary history which shows the evils intended to be remedied may be referred to by the courts.

Johnson vs. Southern Pacific Ry. Co. 196 U. S. 19.

Anderson Net & Twine Co. vs. Worthington, 141 U. S. 468.

Holy Trinity Church vs. United States, 143 U. S. 457.

Dunlap vs. United States, 173 U. S. 65.

Downes vs. Bidwell, 182 U. S. 244.

The debates that took place in Congress and before the Judiciary Committee of both the House and the Senate, made it very plain that it was not the intention of the proponents of the Webb-Kenyon Bill to prevent the individual from getting liquor for his personal use.

At the hearings before the Committee of the Judiciary (Sub-Committee 3) on January 11th, 1912, Honorable E. Y. Webb of North Carolina, one of the authors of the bill, in response to the question of the other members of the committee said that the only purpose of the bill was to prevent the re-sale of liquor in prohibition territory by the consignee, and further says that, "This is the sole purpose of this bill" (pp. 9, 10).

On page 11 of the same document appears the full statement of Mr. Carlin, chairman of the Sub-Committee, and Mr. Webb, as follows:

Mr. Carlin:

> "The purpose of the bill is not to interfere with shipments, but simply to prohibit the shipment of liquor for sale where such sale would be illegal."

Mr. Webb:

> "Yes, sir; that is the object. This bill has been criticized by some of our temperance friends, because it does not undertake to prohibit the shipment of whisky for individual use. As long as the Supreme Court holds that liquor is a legitimate subject of commerce, and as long as men have an appetite for liquor, and as long as the state does not prohibit the drinking of whisky; I do not think a law will be passed prohibiting the shipment of whisky for a man's personal use."

On page 13, Mr. Webb says:

> "This bill does not in anywise affect the right of a man to buy whisky for his personal use."

On page 26 appears the statement of the Reverend Edwin C. Dinwiddie, Washington Representative of The Anti-Saloon League of America, who was the most active and aggressive worker in behalf of the bill, as follows:

> "This bill of itself interferes with no man's

rights to import intoxicating liquors for the purpose of personal consumption."

At p. 28, he says:

"If they are there for a lawful purpose . . . . that is, for personal or family use and not to be used in violation of any state law . . . nobody wants to interfere with these liquors and nobody proposes to interfere with them."

At page 33, he says:

"A man can have liquor shipped in and delivered at his residence for his personal use."

On page 2851 of the Congressional Record, February 8th, 1913, Mr. Roddenbery, a supporter of the bill says:

"It does not interfere with the shipment or reception of liquors for lawful, personal consumption or for any purpose not prohibited by state law."

On December 19th, 1912, page 865, Congressional record, Senator William S. Kenyon says:

"This bill, if enacted, would not be a law to bring about prohibition. It would not be a law to stop personal use of intoxicating liquors nor to prohibit the shipment of intoxicating liquors for personal use, nor to stop the use of intoxicating liquors for sacramental purposes."

He said further:

"There is no purpose in this bill, and the language can not be distorted into the idea so freely circulated in the literature now being dis-

tributed by those opposed to this bill, that it destroys the right of a man to the personal use of intoxicating liquor" (Cong. Rec., Dec. 19, 1912, p. 865).

"If liquors are shipped with the intent to be used by the person for his own personal use, and in no way to violate the law of a state, then they are subjects of commerce" (Cong. Rec., Dec. 19, 1912, p. 869).

"There is no practical trouble with the personal use question. There is no attempt on the part of anybody to construct a law that shall prevent personal use or prevent shipment for personal use, and this bill does not do so" (Cong. Rec., Dec. 19, 1912, p. 874).

In the course of the speech in opposition to the bill of Hon. Thos. H. Paynter of Kentucky in the Senate on February 7, 1913, Senator Kenyon said:

"I do not want to interfere with the orderly course of the Senator's argument, but the statement which the Senator makes that this bill will stop the purchase of liquor for personal use is one that has been made a great deal and one which I absolutely deny."

The Kentucky Statute forbids the delivery by a carrier of liquors generally in local option territory in Kentucky, though it has never been held by the Court of Appeals in a case directly involving the question, that it forbids the delivery for personal use. In Adams Express Company vs. Crigler, 161 Ky. 89, 170 S. W. 542, decided after the repeal of Sec. 2569 a, it was said by way of dictum that that section forbade common

carriers from delivering intrastate shipments for personal use in local option territory in Kentucky.

Assuming that The Kentucky Statute does forbid such deliveries, there is nothing in the Webb-Kenyon Law which forbids the transportation of liquors in interstate commerce, or permits the state law to apply, unless the use intended to be made of the liquors at destination is one that violates the state law. It is arguing in a circle to say that Congress has forbidden the interstate transportation in cases where the state forbids the interstate transportation, or what amounts to the same thing, prevents the interstate transportation by making the delivery at destination an offense. To construe The Webb-Kenyon Law as forbidding interstate transportation when the consignee does not intend to use the liquors in violation of a valid law of the state, is not only contrary to the plain wording of the Law, but attributes to Congress an intention to surrender to the states the power to regulate commerce, which the people delegated to Congress by the constitution. Supposing that Congress may surrender such power to the states as to liquors intended to be used in violation of a state law, it is quite another thing to say that Congress assumed to surrender that power as to liquors not to be used in violation of a state law.

In Adams Express Co. vs. Commonwealth, 154 Ky. 462, 157 S. W. 908, 48 L. R. A. (N. S.) 343 (June 17, 1913), tried with this case in Whitley Circuit Court, it was contended that by reason of the enactment of

the Webb-Kenyon Law, Section 2569 a, Kentucky Statutes, applied to interstate shipments. The Court of Appeals denied this contention and reversed the conviction, holding that the Webb-Kenyon Law permitted the application of the state statute to the interstate transaction only where the consignee intended to use the liquors illegally after delivery, and that it did not permit the application of the state statute forbidding the transportation, and making the place of delivery the place of sale, to interstate shipments of liquor intended for personal use.

After referring to the evidence which showed that the consignee intended to use the liquors personally the court said:

> "This being the purpose for which the liquor was intended to be received, possessed, and used, it is clear that the consignees who received from the carrier the liquor did not, in so doing, violate or intend to violate any law of this state, because there is not and never has been any law of this state that prohibited the citizen from purchasing, where it was lawful to sell it, intoxicating liquor for his personal use, or from having in his possession for such use liquor so purchased. Calhoun vs. Commonwealth, 154 Ky. 70, 156 S. W. 1077; Martin vs. Commonwealth, 153 Ky. 784, 156 S. W. 870; Commonwealth vs. Campbell, 133 Ky. 50, 117 S. W. 383, 24 L. R. A. (N. S.) 172."

The court said further:

> "It is, however, insisted for the common-

wealth that, although the consignee of the whisky in this case may have received it for a lawful purpose, it was nevertheless a violation of law for the carrier to deliver it to him. The argument in this behalf being that as section 2569 a makes it unlawful for a carrier to bring into or deliver in local option territory any intoxicating liquors, subject to the exception mentioned in the section, the fact that the person to whom the liquor is delivered intends to possess and use it lawfully, does not excuse the carrier from doing a thing that is forbidden by the law of the state as expressed in this section. This argument being rested on the proposition that, as it would be unlawful for a carrier, as an intrastate transaction, to deliver this liquor, the Webb-Kenyon Law makes the delivery of it by the carrier unlawful, although it be an interstate transaction, as both interstate and intrastate shipments are now on the same footing and are to be treated precisely alike. In short, it is said that in every case in which it would be unlawful for a common carrier to receive for shipment liquor at a point in this state where it might be sold, and carry and deliver it to the consignee at a point in this state where its sale was prohibited, it would also be unlawful for a common carrier to receive it for shipment at a point outside of the state and deliver it to the consignee at a point in this state where the sale of liquor was prohibited. We do not, however, agree with counsel for the commonwealth in this broad statement of the effect of the Webb-Kenyon Law. There

is the same distinction now that there was before the enactment of this law between intrastate and interstate shipments of liquor, except when the interstate shipments come within the prohibition of the Webb-Kenyon law. It does not follow that because it would be unlawful for a carrier to deliver liquor as an intrastate transaction that it would also be unlawful for it to deliver, under like circumstances, liquor as an interstate transaction. For example, we held in Adams Express Co. vs. Commonwealth, 129 Ky. 420, 112 S. W. 577, 33 Ky. Law Rep. 967, 18 L. R. A. (N. S.) 1182, that under section 2569 a a common carrier was forbidden to carry liquor from a point in this state at which it might be lawfully purchased to a point in the state where the local option law was in force and there deliver it to the consignee; and the validity of this statute as applied to intrastate transactions was recognized by the Supreme Court of the United States in the Cook Brewing Co. Case. But we have also held in C. N. O. & T. P. Ry. Co. vs. Commonwealth, 126 Ky. 563, 104 S. W. 394, 31 Ky. Law Rep. 954, and many other cases, as did the Supreme Court in the Cook Brewing Co. Case, that section 2569 a was inoperative when attempted to be applied, under like circumstances, to interstate transactions.

It therefore appears that the issue in this case really comes down to this: Was the liquor involved in this transaction intended by any person interested therein to be received, possessed, sold, or in any manner used in violation

of any law of this state? It is shown by the agreed state of facts, when considered in the light of the constitution and laws of the state, and the opinions of this court, that it was not. This being true, the aid of the Webb-Kenyon Law cannot be invoked to secure the punishment of the carrier, as it does not prohibit a common carrier from receiving, carrying and delivering, as an interstate transaction, intoxicating liquor to the consignee when it is not intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of the laws of this state, or withhold from such a transaction the protection afforded by the commerce clause of the federal constitution. As to this character of transaction, the Webb-Kenyon Law has no application, and having no application, the law, as it existed before the enactment of this legislation, is in force, and, being in force, the carrier cannot be punished for receiving, carrying, and delivering, as an interstate transaction, intoxicating liquor in local option territory to a consignee who purchased it at a point in another state, and when it is not intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of the law of this state."

In Adams Express Company vs. Commonwealth, 160 Ky. 66, 169 S. W. 603 (October 6, 1914), the same court affirmed this rule, saying:

> "Unless the liquor is intended by some person interested therein to be received, possessed, sold or used in violation of the law of the state,

the act does not apply to it. We accordingly held in Adams Express Company vs. Commonwealth, 154 Ky. 462, 157 S. W. 908, 48 L. R. A. (N. S.) 342, that the act does not apply to shipments of whisky from another State into this State, where the consignee gets it simply for his personal use, there being no law of this State making it unlawful for a person to receive or possess intoxicants in this State for his own personal use. That decision followed the plain language of the act, as well as the express construction put upon it by Mr. Webb and Senator Kenyon in their speeches in advocacy of it on the floor of Congress; and the same view has been taken so far as we are advised by all the courts of last resort, before whom the question has been presented. Atkinson vs. Southern Express Co., 94 S. C. 444, 78 S. E. 516, 520, 48 L. R. A. (N. S.) 349; Palmer vs. Southern Express Co. (Tenn.) 165 S. W. 236; VanWinkle vs. State of Delaware (Del.) 91 Atl. 385."

In VanWinkle vs. State of Delaware, 91 Atl. 385 (June 16, 1914), in the Supreme Court of Delaware, not yet officially reported, overruling State vs. Grier, 88 Atl. 579 (Court of General Sessions of Delaware; October 8, 1913), the opinion by Judge Woolley, now United States Circuit Judge for the Third Circuit, shows that an agent of Adams Express Company was convicted under the "Hazel Law" of Delaware, for delivering a shipment of liquor in dry territory in Delaware, which had been purchased by the consignee in Philadelphia for his personal use. The "Hazel Law"

was enacted after the passage of the Webb-Kenyon Law, and for the purpose of permitting the state to take advantage of the supposed jurisdiction conferred on the states as to interstate shipments by the Webb-Kenyon Law. The Hazel Law provided in Section 1:

> "That it shall be unlawful for any common carrier, knowingly to accept or receive for shipment, transportation or delivery to any person or place within local option territory, or to carry, bring into, transfer to any other person, carrier or agent, handle, deliver or distribute in local option territory, any spirituous, vinous or malt liquor, regardless of the name by which it may be called."

Judge Woolley in an elaborate opinion reviewed the whole history of the subject, including the history of the Webb-Kenyon Law, as to which he said:

> "The Webb-Kenyon Bill, after its introduction, was subjected to vigorous debate and important amendment, with the result that the popular impression of that legislation has been gathered more from the controversy that revolved about it than from knowledge of the measure itself. It is not unnatural, therefore, that the popular conception of the law is that it confers upon a state the power absolutely and totally to prohibit the importation of liquor for any purpose, while an examination of the precise terms of the law shows a very different purpose and a very different power."

At 91 Atl., p. 398, he said:

> "Under this state of the law, the first ques-

tion therefore is: How far and to what extent are the prohibitions of the Hazel Act authorized, aided or validated by the Webb-Kenyon Law, when considered with especial reference to the offense for which the defendant below was indicted? The defendant below, acting as an agent for a common carrier, completed a shipment of liquor from the state of Pennsylvania to a prohibition district in the state of Delaware, by receiving the same and delivering it to the consignee in that district. It is admitted in the case stated that the liquor 'was intended' by the consignee 'to be used by him for his own consumption,' and 'he did not intend to sell or otherwise unlawfully dispose of the same.' The Hazel Act prohibits the shipment of liquor into the prohibition districts of this state for any purpose (excepting the two designated), whether the liquor be intended to be used in violation of law or not. The Webb-Kenyon Law prohibits the shipment of liquor only when the liquor is intended to be used in violation of the law of the state. **There is thus presented a case of a shipment of liquor for a lawful purpose, in violation of a state statute prohibiting the shipment of liquor for any purpose, enacted under authority of a federal statute, prohibiting the shipment of liquor for an unlawful purpose.** The first question for our determination, therefore, is whether the Webb-Kenyon Law prohibits the act with which the defendant below is charged, or makes valid the prohibition of such an act by a state statute. In other words, does the Webb-Kenyon Law apply to this case,

and, if not, is the Hazel Law valid in so far as it prohibits the act committed by the defendant below?

The conclusion reached by the court is stated at p. 405 as follows:

> "But by the Webb-Kenyon Act, Congress expressed its sanction to such a law as the state of Delaware might desire to enact, prohibiting the shipment of liquor from other states into certain districts of this state when it was there to be received, possessed, sold or used in violation of the law of this state. Upon authority of this act the state of Delaware enacted the Hazel Law prohibiting with like intent the shipment of liquor from other states into prohibition districts of this state, there to be used for unlawful purposes. To this extent the Hazel Law is valid, if the Webb-Kenyon Law is valid. But the state of Delaware went further and by the same law prohibited the shipment of liquor from other states into prohibition districts of this state there to be used for purposes recognized by the act itself to be lawful. For this much of the Hazel Law the state of Delaware was without authority of its own and without the aid of the Webb-Kenyon Act, for the Webb-Kenyon Act did not prohibit, nor did it authorize a state to prohibit, the importation of liquor into a prohibition territory, when the liquor was intended for a lawful purpose. The Hazel Act, therefore, in so far as it prohibits the shipment of liquor from another state into a prohibition district of this state, when the liquor is not intended to

> be received, possessed, sold or in any manner used in violation of the laws of this state, but is intended for a lawful purpose, is an enactment without constitutional authority, and when invoked in such cases, amounts to an interference with interstate commerce, and is therefore void."

Palmer vs. Southern Express Co., 165 S. W. 236 (February 28, 1914), in the Supreme Court of Tennessee, not yet officially reported, was an action in replevin by Palmer against the express company to compel it to deliver to him at the office of the express company in Davidson County, Tennessee, a shipment of 15 gallons of liquors which he had purchased at Louisville, Kentucky, for his personal use. By an act of the legislature of Tennessee passed subsequent to the Webb-Kenyon Law it was unlawful;

> "for any person, firm or corporation to ship, carry, transport, or convey any intoxicating liquor into this state, or from one point to another within this state, for the purpose of delivery, or to deliver the same to any person, firm, company, or corporation within the state, except . . . . That nothing in this act shall make it unlawful; . . . . .
>
> 2. For any person to order and have shipped and delivered to him from without the state, for his own use, or the use of the members of his family residing with him, such intoxicating liquor in quantities not exceeding one gallon."

The Supreme Court of Tennessee held that this provision of the Tennessee statute was in contravention of

the commerce clause of the Constitution of the United States and was not authorized by the Webb-Kenyon Law. The court after stating that the opinion was not to be misunderstood as holding the Webb-Kenyon Law inapplicable to "sales of liquor made in a foreign state for shipment into this state to be sold or used in violation of the prohibition laws of this state," said, at p. 244:

> "It is perceived that the thing which the act prohibits is the interstate shipment or transportation of the liquors mentioned therein, when intended by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of the state, etc., into which the shipment is made.
>
> It is enough to say, for the disposition of the case before us, that it does not appear that the liquors shipped were intended to be sold, or used in violation of any law of the state; and therefore the act does not apply to the present controversy. It appears from the facts stated in the bill, confessed by the demurrer, and agreed to on the record at the hearing in the court below, that the liquors were purchased for the personal use of complainant and his family. This was a lawful use, and indeed permitted by the statute in question."

In Hamm Brewing Co. vs. Chicago R. I. & P. Ry. Co. 215 Fed. 672 (1913), District Judge Willard, by mandatory injunction compelled defendant to carry

plaintiff's shipments of beer from Minnesota into the State of Iowa. He said:

> "The beer which Moss, a resident of Iowa, ordered from the plaintiff, whose brewery is established at St. Paul, Minn., and which was to be shipped over the defendant's line of railroad, was not intended by either Moss or the railroad company to be received, possessed, sold, or used in violation of any law of Iowa. The law of Iowa does, however, prohibit the transportation by any common carrier of intoxicating liquors, unless the person to whom the liquor is consigned has a permit. But the Webb-Kenyon Law, while it says that the liquor must not be received, possessed, sold or used in violation of law, does not say that it shall not be transported in violation of law. If it had been the intention of Congress to prohibit the procurement from points outside the State by a citizen of Iowa of intoxicating liquors for his own personal use, it would have been very easy to have indicated that by prohibiting the transportation of all interstate shipments."

Ex parte Peede, 170 S. W. 749 (Court of Criminal Appeals of Texas, October 14, 1914; on motion for rehearing, November 18, 1914), was a prosecution of an agent of Wells Fargo Express Company for violation of the Allison Law of Texas, which, as contended by the state, made it an offense for a carrier to deliver interstate shipments of liquor in dry territory in Texas for the personal use of the consignee. In an exhaus-

tive opinion the majority of the court use the following language in reference to the Webb-Kenyon Law:

> "It is thus seen that Congress, although it had the right to do so, does not prohibit, nor authorize the states to prohibit, interstate shipments of intoxicating liquor, but only prohibits the interstate shipment when intended to be received or possessed to be sold or used in violation of a law of the state. It removed the protecting arm of the interstate commerce clause of the federal constitution thus far and no further, and to hold otherwise, in our opinion, would render, under the decisions of the Supreme Court of the United States, Section 5 of the Allison Law violative of the interstate commerce clause of the Constitution of the United States, and open wide the door to the interstate shipment of intoxicating liquors for both legal and illegal purposes. Congress closed, and authorized the state to close, the door to interstate shipments when such liquors are intended for sale in violation of the law of the state, or to be in any manner used in violation of a law of the state. Thus far Congress saw proper to go and no further. This is made manifest by the remarks of Mr. Webb, the author of the bill, when it was pending in Congress. While considering the bill the following colloquy took place:
>
> 'Mr. Carlin. The purpose of this bill is not to interfere with shipments, but simply to prohibit the shipment of liquor for sale where such sale would be illegal?
>
> Mr. Webb. Yes, sir; that is the object. The bill has been criticized by some of our temper-

ance friends because it does not undertake to prohibit the whisky for individual use. As long as our Supreme Court holds that liquor is a legitimate subject of commerce, and as long as men have an appetite for liquor, and as long as the state does not prohibit the drinking of whisky, I do not think a law will be passed prohibiting the shipment of whisky for a man's personal use.'

If the language of the bill was obscure or ambiguous this would be material in construing it. But the language is plain and unambiguous, and that the author used the language he did intentionally and he had not sought, and did not intend to prohibit interstate shipment of intoxicating liquors when intended for one's own use, but only when intended to be sold or used in violation of the law in prohibition territory, is manifest."

On motion for rehearing the court adopted as its opinion the opinion of the Supreme Court of Delaware in VanWinkle vs. State, saying that that case "reviews the history of this character of litigation and disposes of every question raised by the state on the motion for rehearing."

Southern Express Co. vs. State, 66 So. 115 (Supreme Court of Alabama, June 30, 1914), was a bill in equity by the state to enjoin the maintenance of the company's warehouses in Morgan County, Alabama, as a liquor nuisance. The Supreme Court reversed a decree of the lower court allowing an injunction. The court holds that no law of the State of Alabama pre-

vents or can, under the Webb-Kenyon Law, prevent the delivery by a carrier of liquors intended for personal use, and that the only ground upon which an injunction against the carrier would be justified would be that the liquors were intended for illegal sale and the carrier has knowledge of that fact. The court said (66 So. 124):

> "In so far as this state is concerned, its laws have no effect upon liquors brought into this state from another state unless, in contravention of the Act of Congress, the carrier has them in its possession for the purpose of delivery or undertakes to deliver them for illegal use in the state. The laws of this state have no extraterritorial force, and the Webb Bill was not intended to give to our laws any such force. The State of Alabama has nothing to do with sales that may be made in another state. It is, however, interested in the question as to whether a carrier of interstate commerce shall deliver to a consignee in this state an article which the consignee intends to use in this state in violation of a valid state law. The true legal effect of the Webb Bill, construed in connection with our prohibitory statutes, is to prohibit a carrier engaged in interstate commerce from delivering or having in its possession, for the purposes of delivery to a consignee, liquor which has come into its hands and which the consignee intends to use in violation of our laws."

Southern Express Co. vs. City of High Point, 83 S. E. 254 (Supreme Court of North Carolina, October 28,

1914), was an action for injunction by the Southern Express Company against the city officials of High Point to restrain them from enforcing an ordinance of that city against a delivery of interstate shipments of liquor in the city by the express company. The bill was dismissed, the court holding that there was no necessity for a remedy by injunction because "in any prosecution of an indictment under this act, it is a valid defense that the liquor was intended for a lawful purpose, and therefore the courts will not undertake to determine upon injunction proceedings whether shipments of liquor are intended for an illegal or a legal purpose."

In Bristol Distributing Co. vs. Southern Express Company (Supreme Court of Appeals of Virginia, January 12, 1915), not yet reported, the court held that the Bristol Distributing Company, a licensed liquor dealer in Virginia, was entitled to a mandatory injunction against Southern Express Company to compel that company to receive at Bristol, Virginia, shipments of intoxicating liquors destined to points in the state of North Carolina for the personal use of the consignees. The decision was based upon the decision of the North Carolina court in Southern Express Company vs. High Point, to the effect that it being no violation of the law of North Carolina for a carrier to transport and deliver shipments for personal use in that state, such shipments are not prohibited by the Webb-Kenyon Law.

State of West Virginia vs. Adams Express Co., 219 Fed. 331 (Dist. Court, Western District of W. Va. October 19, 1914), was a suit in equity by the State in one of its own courts to enjoin the Adams Express Company from delivering liquors ordered by a citizen of West Virginia for his own personal use from a licensed wholesale dealer outside the State. The Adams Express Company removed the case to the Federal Court, where it was held, as shown by the opinion of District Judge Keller, that;

> "Hence there is nothing in either the Wilson Act or the Webb-Kenyon Act which authorized the state to interfere with the shipment and delivery of liquors ordered by a citizen of West Virginia for his own personal use from a licensed wholesale dealer without the state, and it follows that the preliminary injunction awarded by the Circuit Court of Kanawha County should be dissolved and the bill dismissed. I wish it understood that this ruling is made strictly upon the case before me, and has no reference to what might be the duties or obligations of the transportation company in the case of a consignment of liquor intended by the consignee to be resold or used in violation of the laws of West Virginia."

On appeal to the United States Circuit Court of Appeals for the Fourth Circuit, in State of West Virginia, appellant, vs. Adams Express Co., 219 Fed. 794, decided January 13, 1915, this decision was reversed.

Jas. Clark Distilling Co. vs. Western Maryland Ry.

Co., 219 Fed. 333 (see also Jas. Clark Distilling Co. vs. American Express Co., 219 Fed. 339), was a bill in equity in the District Court of the United States for the District of Maryland by the distilling company to compel the defendant railway company to transport liquors from the place of business of plaintiff in Maryland to consignees, located on the lines of defendant railroad in the counties of Mineral, Grant and Tucker in the State of West Virginia, for their personal use. Prior to the filling of the bill the State of West Virginia had brought a suit in equity against the defendant railway company in a state court having jurisdiction in Mineral, Grant and Tucker Counties, and had obtained an injunction ex parte preventing the railroad company from delivering shipments in certain cases within the jurisdiction of the court. The bill of the state in the state court was based upon certain provisions of an act of the legislature of West Virginia effective July 1, 1914, known as the Yost Law, which, as contended by the state, prohibited a common carrier from delivering interstate shipments of liquor for personal use to consignees in West Virginia. It was as a result of the injunction so granted in the state court that the railroad company refused to accept for carriage into West Virginia the shipments which plaintiff had sold at its place of business in Maryland for the personal use of the consignees in West Virginia. The State of West Virginia on its own motion was made a party to the case in the United States District Court in

Maryland, and as appears from the opinion (p. 337), contended at the hearing;

> "First, that any shipment into West Virginia by a seller to a buyer of intoxicants was prohibited; Second, that, even if that was not so, any such shipment was forbidden if the seller had by mail or otherwise solicited the order for it."

In support of its first contention the state relied upon a clause of Section 3 of the West Virginia Law which reads:

> "In case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employe."

The District Judge held that such interpretation of the statute could not be accepted and stated that:

> "There is nothing in the act, however, to indicate that the state had any objection to any one obtaining liquor for his own personal use provided he can do so otherwise than by, within the state, buying or making it," and that, "it follows that liquor brought into West Virginia for the exclusive personal use of the consignee is not intended by any one interested therein to be received, possessed, or used in violation of any law of that state."

The conclusion of the court on this point is stated as follows:

> "In this case nothing need be decided other than that the defendant as a common carrier is bound to receive for shipment, and to transport and deliver in West Virginia, such liquors as are intended solely for the personal use of the consignee, even though the orders for them had been solicited by letters mailed at points outside the state. It has no right to accept for shipment, or to deliver in West Virginia, liquors which are intended by any person interested therein to be used in any way forbidden by the law of that state."

As shown by the report in 219 Fed. at 339, a decree as indicated in this opinion was entered December 24, 1914. As noted above, the United States Circuit Court of Appeals for the Fourth Circuit handed down its opinion reversing the judgment of the District Court of the United States for the Western District of West Virginia in State of West Virginia vs. Adams Express Company, 219 Fed. 794. Whereupon Judge Rose in the District Court for the District of Maryland directed a re-argument of James Clark Distilling Co. vs. Western Maryland Railway Co., and on January 23, 1914, set aside the decree of December 24, 1914, and dismissed the bill, in conformity with the opinion of the Circuit Court of Appeals. The same action was taken in James Clark Distilling Company vs. American Express Co., 219 Fed. 339. Appeals from the final judgment of the district court in each of these two cases have been perfected and are now pending on the docket of this court as follows:

James Clark Distilling Co. vs. Western Maryland Railway Company, et al., No. 857, October Term, 1914,

And

James Clark Distilling Co. vs. American Express Company, et al., No. 858, October Term, 1914.

The foregoing cases in the highest courts of Kentucky, Delaware, Tennessee, Texas, Alabama, North Carolina and Virginia, and elsewhere, agree that the Webb-Kenyon Law undertakes to confer on the states no power to interfere with the interstate transportation and delivery of liquors intended by the consignee for lawful, personal use.

On the other hand it is held that where the consignee intends to sell the imported liquors in violation of the law of the destination state, the Webb-Kenyon Law authorized the application of the state law to the interstate shipment.

State vs. United States Express Co., 145 N. W. 451 (Supreme Court of Iowa, February 17, 1914), was an injunction on behalf of the state abating as a nuisance the office of the express company at the city of Ottumwa, Iowa, on the ground that it was delivering interstate shipments of liquor to consignees for purposes of illegal sale, of which fact the company's agent at Ottumwa had notice.

The court found that the consignee of said liquors;

"was the sole person interested therein, and

he intended, all of the time, to receive and possess with intent to sell the beer and liquors in Ottumwa, in violation of the laws of the State of Iowa. . . . The defendant at the time of the delivery of the beer and the liquors to J. Erbacher did not have notice or actual knowledge that he was buying or receiving the same with the intent and purpose of selling it in violation of law, but was in possession of such facts, that upon reasonable inquiry, it would have ascertained he was buying and receiving and holding the beer and liquor with intent to sell the same in violation of the laws of Iowa, and is therefore chargeable with such knowledge" (145 N. W. 453).

At p. 455, the court said:

"Eliminating, as we must for the purposes of this case, the question as to an interstate shipment for the personal use of the buyer and the consignee, there is no room for doubt as to the proper interpretation of the act. It does just what the title says it was intended to do, to-wit, divests intoxicating liquors of their interstate character in certain cases, and these cases are specifically set out in the act itself. That is to say, the shipment or transportation of intoxicating liquor from one state to another, when such shipment is intended by any person interested therein to be received, sold, or used in violation of any law of such state (to which the shipment is made), is prohibited. This is the sum and substance of the act, and that it has reference to such shipments as are involved in this case clearly appears."

State vs. Doe, 92 Kan. 212, 139 Pac. 1169 (April 11, 1914), was a similar case. It involved a seizure and condemnation under a Kansas statute of a car-load of beer destined to a consignee "engaged in the wholesale liquor business in Cherokee County in violation of law." The first syllabus, by the court, reads:

> "The Webb-Kenyon Act, Prohibiting the Shipping of Intoxicating Liquors into States for Use in Violation of Law, is Constitutional and Valid. Under the Act of Congress of March 1, 1913, entitled 'An act divesting intoxicating liquors of their interstate character in certain cases' (Part 1, 37 U. S. Statutes at Large, Ch. 90, p. 699), intoxicating liquors are recognized as legitimate subjects of interstate commerce only when not intended for sale or use in violation of the laws of the destination state, and the fact that a car-load of intoxicating liquors, seized in bulk at the place in this state to which it was consigned, was still in course of transportation, originating in another state, did not protect the liquor from condemnation consequent upon a judicial determination regularly made that it was intended for unlawful use in Kansas."

Smith vs. Southern Express Co., 82 S. E. 15 (Supreme Court of North Carolina, May 30, 1914), was an action to recover a penalty from the carrier under a statute for refusal to deliver to plaintiff as consignee an interstate shipment of liquor. The scope of the opinion is indicated by the following statement appearing at p. 17:

> "It thus appears that he (the plaintiff) has no valid license permitting him to sell either as druggist or otherwise, and, it being his avowed intention to sell for profit and by the way of prescription, an act made a misdemeanor by the statute unless a valid license is first obtained, the court will not aid him to this intended breach of the criminal law, nor should it penalize one who, knowing the facts, has declined to deliver the liquor in furtherance of his unlawful purpose."

In order to make the list of cases on the subject complete we refer to two cases in which the Webb-Kenyon Law was discussed in the opinion, but which determine no question bearing on the present case;

Atkinson vs. Southern Express Company, 94 S. C. 44, 78 S. E. 516, held that a law of South Carolina prohibiting the delivery of interstate liquor shipments in that state, which had been held unconstitutional, could derive no force from the Webb-Kenyon Law without re-enactment.

State vs. Cardwell, 166 N. C. 308, 81 S. E. 628 (April 22, 1914), was a conviction on the charge of selling liquors in violation of law. The court referred to the Webb-Kenyon Law but stated that it was not involved in the case, because the evidence did not show an interstate but an intrastate shipment.

There are three other decisions involving the Webb-Kenyon Law which are not in accord with the cases cited.

American Express Co. vs. Beer, 65 So. 575 (Supreme Court of Mississippi, June 22, 1914), holds that the legislature of Mississippi had power under the Webb-Kenyon Law to restrict the amount of liquor which can be delivered to a consignee and to require a statement to be signed by the consignee in connection with such delivery. The court expressly referred to Adams Express Co. vs. Commonwealth, 154 Ky. 462, and Palmer vs. Southern Express Co., 165 S. W. 236, but apparently disagreed with the conclusions reached by the highest courts of Kentucky and Tennessee, preferring to follow State vs. Grier, 88 Atl. 579, in the Court of General Sessions of Kent County, Delaware. American Express Co. vs. Beer was decided by the Supreme Court of Mississippi, June 22, 1914, and the attention of the court was evidently not directed to the fact that State vs. Grier, 88 Atl. 579, had been overruled by the Supreme Court of Delaware in VanWinkle vs. State, 91 Atl. 385, on June 16, 1914.

United States Ex rel Zimmerman vs. Oregon Navigation Co., 210 Fed. 378, was an application for writ of mandamus in the District Court for the District of Oregon to require the defendant railway company to transport whisky from Portland, Oregon, to a consignee in prohibition territory in Idaho for his personal use. The opinion denying the writ is not a careful consideration of the subject. Judge Bean says:

> "The language of the Idaho statute is manifestly broad enough to make unlawful all intra-

state shipments of intoxicating liquors (except certain shipments not material here), although intended for the personal use of the consignee. And in my judgment it should be so treated and considered by a nisi prius court sitting in another jurisdiction until it is otherwise interpreted by the courts of Idaho and especially in a case where it is sought by mandamus to compel a defendant to violate the terms of the statute. Nor am I prepared at this time to say that such a provision is unconstitutional."

The only case relied on by Judge Bean in support of his conclusions was the overruled case of State vs. Grier, which he erroneously supposed to be the decision of a court of last resort.

In State of West Virginia vs. Adams Express Company, 219 Fed. 794, it was held that the State of West Virginia had the power to enact that the place of delivery in West Virginia of an interstate shipment of liquors in fact purchased by the consignee from the shipper in another state, for the personal use of the consignee, was the place of sale of such liquors, and that the act of the legislature of West Virginia in force July 1, 1914, was such an enactment. It was further held that "The Webb-Kenyon Law removes the protection (of the interstate commerce clause of the Federal Constitution), and subjects the delivery of liquor in West Virginia to the inhibition of the state legislature, although the contract of sale be made in Ohio for the shipment of liquor to West Virginia."

In addition to these cases there is pending in the

Supreme Court of Appeals of West Virginia a case involving the same questions entitled Adams Express Company, Appellant, vs. State of West Virginia, Appellee, No. 2830 on the docket of that court, not yet decided.

We submit that the court below, and the United States Circuit Court of Appeals for the Fourth Circuit, 219 Fed. 794, adopted an erroneous construction of the Webb-Kenyon Law. We contend that that law does not authorize the state to interfere with interstate shipments for personal use, or at any rate the law does not authorize interference with such liquors unless the state, by a law otherwise valid, makes it an offense for a citizen to personally use liquors, or have them in possession for such use. That this limitation in the scope of the Webb-Kenyon Law cannot be removed by the framing of state statutes in different forms; either by forbidding the carrier to transport, or making the place of delivery the place of sale, or other provisions of the kind.

The Webb-Kenyon Law, as Construed and Applied by the Lower Court, would be Unconstitutional.

The construction of the Webb-Kenyon Law, adopted by the Court of Appeals of Kentucky in Adams Express Company vs. Kentucky, 154 Ky. 462, should be adopted, and that of the court below rejected, in order to save the constitutionality of the law. As said in Rhodes vs. Iowa, 170 U. S. 412:

> "The right to contract for the transportation of merchandise from one state into or across

> another involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several states, since it embraced a contract which must come under the laws of more than one state."

The power to regulate commerce is the power to prescribe the rule by which the traffic is governed; "Nor" (as said in in re Rahrer, 140 U. S. 155) "can Congress transfer legislative power to a State nor sanction a state law in violation of the constitution; and if it can adopt a state law as its own, it must be one that it would be competent for it to enact itself, and not a law passed in the exercise of the police power."

A contract made in Tennessee, where it is legal to sell, for the sale of liquors intended for the personal use of the consignee in Kentucky, where it is no offense to possess or use them, their transportation and delivery at destination, is a subject matter which belongs to interstate commerce and not to the reserved police power of Kentucky. It is one which, in its nature and by the constituton, demands that, if regulated at all, it must be regulated by Congress, and not by Kentucky upon an attempted surrender by Congress of the constitutional power.

We, therefore, respectfully submit that the judgment should be reversed.

Lawrence Maxwell,
Joseph S. Graydon,
Attorneys for Adams Express Company.

SCHEDULE OF POINTS AND AUTHORITIES

CONSTITUTIONALITY OF WEBB-KENYON LAW.

	Page
Dunlap vs. United States, 173 U. S., 65	7
Downes vs. Bidwell, 182 U. S., 244	7
Maxwell vs. Dow, 176 U. S., 581	8
Lapina vs. Williams, 232 U. S., 78	9
Bowman vs. Chicago, &c. Ry., 125 U. S., 507	10
Leisey vs. Hardin, 135 U. S., 100	10
Wilson Act, of 1890, 23 Stat., 313	11
In Re Rahrer, 140 U. S., 545	11
Rhodes vs. Iowa, 170 U. S.	14
Vance vs. Vandercook, 170 U. S., 438	15
Champion vs. Ames, 188 U. S., 356	16
Hipolite Egg Co. vs. U. S., 220 U. S., 45	18
Hoke vs. U. S. (White Slave cases), 227 U. S., 308	18
State vs. U. S. Express Co., 145 N. W., 451	19
State vs. Doe, 139 Pac., 1168	20

THE WEBB-KENYON ACT CONTEMPLATES OTHER INTERESTS THAN THAT OF THE CONSIGNEE.

Adams Ex. Co. vs. Com., 154 Ky., 462	21
Adams Ex. Co. vs. Com., 160 Ky., 66	23
L. & N. vs. Cook Brewing Co., 223 U. S., 70	24
Hamm Br. Co. vs. C. R. I. & P. Ry., 215 Fed., 672	24
Van Winkle vs. State, 91 Atl., 385	25
Greer vs. State, 88 Atl., 579	27, 25
Dewey vs. U. S., 178 U. S., 510	26
Am. Express Co. vs. Beer, 65 Sou., 575	27
Hough vs. City Fire Ins. Co., 29 Conn., 10	28

IT IS COMPETENT FOR THE LEGISLATURE TO MAKE THE PLACE OF DELIVERY THE PLACE OF SALE.

State vs. Patterson, 135 N. C., 612	28
State vs. Herring, 145 N. C., 418	29
American Ex. Co. vs. Iowa, 196 U. S., 133	29
West Va. vs. Adams Ex. Co., 219 Fed., 794 (C. C. A.)	30
Com. vs. Campbell, 133 U. S., 50	32
Com. vs. Smith, 163 Ky., 227	32
Calhoun vs. Com., 154 Ky., 70	32

No. 271

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

ADAMS EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE CIRCUIT COURT OF WHITLEY COUNTY, STATE OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This proceeding involves the constitutionality and proper construction of the Act of Congress of March 1, 1913, commonly known as the "Webb-Kenyon Law," which, including its title, is:

"AN ACT DIVESTING INTOXICATING LIQUORS OF THEIR INTERSTATE CHARACTER IN CERTAIN CASES.

"Be it enacted, etc., That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented

or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented or other intoxicating liquor is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, is hereby prohibited."

Subsequent to the becoming effective of the foregoing Act of Congress, the Adams Express Company, as a carrier for hire, transported from a point in the State of Tennessee to Whitley County, Kentucky, a shipment of intoxicating liquors and there delivered it to the consignee, who intended such liquors for his personal use and so used them. The carrier was, on account of this transaction, proceeded against under an agreed stipulation of facts, appearing at pages 24 to 27 of this record, paragraphs numbered 3 and 6 being as follows:

3.

"On the several dates named in said indictments, Adams Express Company knowingly brought into, transferred, delivered and distributed certain spirituous liquors, to-wit: whiskey, in local option territory and where the local option law was in force, as charged in said indictments. Prior to the time of said bringing into, transferring, delivering and distributing said liquors the consignees of said liquors, being the persons named in said indictments, respectively, had sent orders by mail for said liquors to dealers at Jellico, in the State of Tennessee, and High Cliff, in the State of Tenn-

essee, and had paid the purchase price of said liquors to said dealers at said places in Tennessee."

6.

"Said liquors were intended by said consignees, being the persons named in said indictments as witnesses, respectively, for their personal use and were so used by them, and were not intended by them to be sold contrary to law, and were not so sold by them."

The indictment was based on Section 2569-a of the Kentucky Statutes, which provides:

"1. UNLAWFUL TO CARRY LIQUOR INTO PROHIBITED TERRITORY—PERSONS EXEMPT FROM ACT.—It shall be unlawful for any person or persons, individual or corporation, public or private carrier to bring into, transfer to other person or persons, corporations, carrier or agent, deliver or distribute, in any county, district, precinct, town or city where the sale of intoxicating liquors has been prohibited or may be prohibited, whether by special act of the General Assembly, or by vote of the people under the local option law, any spirituous, vinous, malt or other intoxicating liquor, regardless of the name by which it may be called; and this act shall apply to all packages of such intoxicating liquors whether broken or unbroken.

"Provided individuals may bring into such district, upon their person or as their personal baggage, and for their private use, such liquors in quantity not to exceed one gallon: And provided, The provisions of this act shall not apply to licensed physicians or druggists, to whom any public carrier may deliver such goods, in unbroken packages, in quantity not to exceed five gallons at any one time.

"2. EACH PACKAGE SEPARATE OFFENSE.—Each package of such spirituous, vinous, malt or other intoxicating liquor, regardless of the name by which it may be called, whether broken or unbroken pack-

ages, brought into and transferred to other person, corporation, carrier or agent, delivered or distributed in such local option territory, shall constitute a separate offense.

"3. PENALTIES.—Any person or persons, individual or corporation, public or private carrier violating the provisions of this act shall be deemed guilty of violating the local option law and shall be fined not less than fifty nor more than one hundred dollars for each offense.

"4. PLACE OF DELIVERY—ACT ONLY APPLIES TO COMMON CARRIERS.—And the place of delivery of such liquors shall be held to be the place of sale: Provided further, That the provisions of this act shall only apply to common carriers, corporations, firms or individuals who usually carry freight or goods for hire; and every firm, common carrier, corporation or individual who receives pay for conveying vinous, malt or spirituous liquors shall be deemed a violator of the provisions hereof.

"5. REPEALING CLAUSES.—And all laws in conflict with this act are hereby repealed."

It may be here stated that this statute was held, by the Kentucky Court of Appeals, to be inoperative as to interstate shipments, in the case of C., N. O. & T. P. Ry. vs. Commonwealth, 126 Kentucky, 563, decided in 1907, but valid as to intrastate shipments, in the case of Adams Express Company vs. Commonwealth, 129 Kentucky, 420, decided in 1908. The Supreme Court of the United States also considered this section, in the case of L. & N. R. R. vs. Cook Brewing Company, 223 U. S., 70, January 22, 1912, and held it inoperative as to interstate shipments, but otherwise valid. It will be observed that all of these cases were decided prior to the enactment of the Webb-Kenyon Law.

ISSUES INVOLVED.

In addition to the constitutionality of the Act of Congress, the essential point in the present case is whether the transaction set out in the indictment and stipulation of facts is, since the enactment of the Webb-Kenyon law, subject to the operation of Section 2569-a of the Kentucky Statutes.

The theory of the appellant, which appears at large in its Assignment of Errors (R. 20 and 21), is, in substance, that the Webb-Kenyon law does not divest this shipment of its interstate character because the consignee intended it for his personal use and did not intend to "receive, possess, sell or in any manner use" the liquor in violation of any law of Kentucky. It is further claimed that the Act of Congress is unconstitutional, but the contention chiefly relied on is that it does not apply to "personal use" shipments, under existing laws of the State of Kentucky.

For the Commonwealth, we will submit the following propositions:

"(1) The Webb-Kenyon Act is constitutional.

"(2) The consignee is not the only person interested in a shipment of liquor into Kentucky local option territory, within the meaning of the Webb-Kenyon law; the carrier is also interested.

"(3) The Kentucky Statute making the place of delivery the place of sale is valid, it being competent for a legislature so to change a pre-existing common law rule to the contrary.

"(4) Personal use shipments into Kentucky have been divested by the Webb-Kenyon law of their interstate character and are within the operation of Section 2569-a."

CONSIDERATION OF CONGRESSIONAL DEBATES IS NOT PERMISSIBLE IN CONSTRUING AN ACT OF CONGRESS.

Before taking up these propositions, it should be stated that we do not agree with counsel for plaintiff in error that citations from Congressional Debates which attended the passage of the Webb-Kenyon Act are material to the judicial construction of its provisions.

In support of the restricted construction sought to be put on the Webb-Kenyon Act by the Express Company, various quotations are made by plaintiff in error from the Congressional Debates, the substance of them being that the speakers quoted did not regard the bill as interdicting personal use shipments. The fact that such arguments were necessary shows of itself that other members took the opposite view of the legal import of the phraseology of the act and what it might thereafter be construed by the courts to include.

Were these debates a proper subject of consideration by this court, under its established practice in statutory construction—which will presently be shown is not the case—they do not sustain the appellants present contention.

The intention of the author of the bill, Mr. Webb, is readily apparent from his own statement, viz.:

Mr. Carlin:

> "The purpose of the bill is not to interfere with shipments, but simply to prohibit the shipment of liquor for sale where such sale would be illegal."

Mr. Webb:

> "Yes, sir; that is the object. This bill has been criticised by some of our temperance friends, be-

cause it does not undertake to prohibit the shipment of whiskey for individual use. As long as the Supreme Court holds that liquor is a legitimate object of commerce, and as long as men have an appetite for liquor, and as long as the state does not prohibit the drinking of whiskey, I do not think a law will be passed prohibiting the shipment of whiskey for a man's personal use."

The statement that the author did not "think a law will be passed (by a state) prohibiting the shipment of whiskey for a man's personal use," shows that he was fully aware of the possibility of such a contingency. The circumstance that Senator Paynter of Kentucky, and a former Chief Justice of this State, construed the bill then under discussion as effective to stop personal use shipments is also significant. He knew that his own state was one of the few which then had on its statute books a law of the exact nature which Mr. Webb had stated he did not anticipate would be passed, but, if passed, would include such shipments.

In holding the Act of Congress inapplicable to personal use shipments, some of the state courts of last resort which have done so have expressly based their decisions on the fact that their states then had in effect no statute which prohibited such shipments and deliveries and stated that, were such a law in existence, a different case would be presented. Kentucky already had such a law.

While the foregoing reference is made on account of the insistence with which the consideration of these debates is now being urged by plaintiff in error, we are fully aware of the fact that such discussion is not proper under the practice existing in the Supreme Court. In justification of reference to these debates, plaintiff in error cites several decisions, the more recent of which are Dunlap vs. U. S., 173 U. S., 65, and Downes vs. Bidwell, 182 U. S., 244.

The following quotations from these particular opinions are sufficient to dispose of the contention. In the Dunlap case the court explains its allusion to Congressional Debates as follows (75):

> "Without questioning the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of a statute passed by that body (U. S. vs. Trans-Mo. Frt. Assn., 166 U. S., 318), it is nevertheless interesting to note that efforts were made in the Senate to amend the bill, etc."

In the Downes case also it is said (254):

> "It is unnecessary to enter into the details of this debate. The arguments of individual legislators are no proper subject for judicial comment. They are so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as dictating the construction to be put upon the constitution by the courts."

That this reasoning applies with most peculiar force to speeches of Congressmen on the then nationally discussed liquor question, which the speakers knew would be given nation-wide publicity, needs no comment.

The reason for this rule of statutory construction is very clearly stated in Maxwell vs. Dow, 176 U. S., 581, (601), as follows:

> "What speeches were made by other Senators and Representatives in the House upon this subject is not stated by counsel, nor does he state what construction was given to it, if any, by *other* members of Congress. It is clear that what is said in Congress upon such an occasion may or may not express the views of the majority of those who favor the adoption of the measure which may be before

that body, *and the question whether the proposed amendment itself expresses the meaning which those who spoke in its favor may have assumed that it did, is one to be determined by the language actually therein used, and not by the speeches made regarding it.*

"What individual Senators or Representatives may have urged in the debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill, or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it."

The foregoing rule has also been reaffirmed in the recent case of Lapina vs. Williams, 232 U. S., 78-90.

THE WEBB-KENYON ACT IS CONSTITUTIONAL.

It is claimed that Congress has, by this Act, attempted to delegate to the states, contrary to the Constitution, the power to regulate interstate commerce. That, of course, cannot be done, and, so long as a given character of liquor traffic remains *interstate commerce,* it will continue subject to the regulation of Congress. It is equally true, however, that Congress also has power to divest of its former interstate character and protection any traffic which it may deem advisable.

The clear provision, and announced purpose, according to its title, of this Act is not to delegate to the states the power to regulate an interstate traffic but rather, by the authority of Congress itself, to remove such traffic from interstate commerce. In order most clearly to understand what was the status of the liquor traffic when Congress thus undertook to legislate upon it, a review of former litigation and the decisions of this Court upon it is necessary.

It having been held, in Bowman vs. Chicago, Etc. Ry.

Co., 125 U. S., 507, that liquor was a legitimate article of commerce and therefore within the protection of interstate commerce, it became necessary to determine how far such protection attached. In Leisey vs. Hardin, 135 U. S., 100, a statute of the state of Iowa was considered which attempted to regulate the sale, in the original package, of liquors which had been imported into that state.

This Court held that not only was the importation within the protection of interstate commerce, but also that sales in the original package were equally exempt from State regulations, it being said:

> "Under our decision in Bowman vs. Chicago, &c. Ry. Co., 125 U. S., 507, they had the right to import this beer into that state, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that, in the absence of Congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations, while they retain their character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a state *the power to exclude, directly or indirectly* articles so situated, *without Congressional permission,* is to concede to a majority of the people of a state, represented in the state legislature, the power to regulate commercial intercourse between the states, etc."

This court, in that opinion, further intimated that Congress might take action which would render the Iowa statute effective, in the following language:

> "The responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

Acting on this suggestion Congress immediately passed the Wilson Act, of 1890, entitled: "An Act to Limit the Effect of the Regulations of Commerce Between the Several States and with Foreign Countries in Certain Cases," which reads as follows:

> "That all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police power, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." 26 Stat., 313.

This act was attacked on constitutional grounds and was accordingly construed in the case of In re Rahrer, 140 U. S., 545. An inspection of the schedule of points and authorities for appellee, accompanying the opinion as reported, shows that the identical objections were made to the Wilson Act which are now being urged against the Webb-Kenyon Law, viz.: That Congress has no power under the Constitution to grant to the states power to regulate commerce among the states; that a

state court cannot exercise jurisdiction conferred upon it by Congress; and that Congress cannot vest any portion of the judicial power of the United States except in courts ordained and established by itself. It was also further contended, at that time, that sale in the original package is as much interstate commerce as is transportation and that the right to protection of both from state regulation is derived from the Federal Constitution.

In disposing of these contentions it was held, in terms equally as applicable to the Webb-Kenyon law as to the Wilson Act, that (560):

> "It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a State. This being so, it is urged that the Act of Congress cannot be sustained as a regulation of commerce, because the Constitution, in the matter of interstate commerce, operates *ex proprie vigore* as a restraint upon the power of Congress to so regulate it as to bring any of its subjects within the grasp of the police power of the State. In other words it is earnestly contended that the Constitution guarantees freedom of commerce among the states in all things, *and not only may intoxicating liquors be imported from one state into another, without being subject to regulation under the laws of the latter, but that Congress is powerless to obviate that result.*
>
> "Thus the grant to the general government of a power designed to prevent embarrassing restrictions upon interstate commerce, by any state, would be made to forbid any restraint whatever. We do not concur in this view. In surrendering their own power over external commerce, the states did not secure absolute freedom in such commerce, but only the protection from encroachment afforded by confiding its regulation exclusively to Congress.
>
> "By the adoption of the Constitution the ability of the several states to act upon the matter solely in accordance with their own will was extinguished, and the legislative will of the general gov-

ernment substituted. * * * But this furnishes no support to the position that Congress could not, in the exercise of the discretion imposed in it, concluding that the common interest did not require entire freedom in the traffic in ardent spirits, enact the law in question. *In so doing Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt state laws.* It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws dealing with such property."

And also (562):

"No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.

"The differences of opinion which have existed in this tribunal in many leading cases upon this subject, have arisen, not from a denial of the power of Congress, when exercised, but upon the question whether the inaction of Congress was in itself equivalent to the affirmative interposition of a bar to the operation of an undisputed power possessed by the states.

"We recall no decision giving color to the idea that when Congress acted its action would be less potent than when it kept silent.

"The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge. The manner of that disposition brought into determination upon this record involves no ground for adjudging the act of Congress inoperative and void."

With reference to the contention that the passage of the act of Congress did not revive and make effective state statutes which had previously been inoperative as to the character of commerce affected by such congressional legislation, it was said (564):

> "Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

Thereafter, in Rhodes vs. Iowa, 170 U. S., the question of how soon the State's authority attached under the Wilson Act, whether at the state line or on delivery at destination, was raised. The Rharer case was extensively reviewed, explained and the extent of its holding summed up to the effect that:

> "Whilst it is true that the right to sell free from state interference interstate commerce merchandise was held in Leisey vs. Hardin, to be an essential incident to interstate commerce, it was yet but an incident, as the contract of sale within a state in its nature was usually subject to the control of the legislative authority of the state. On the other hand, the right to contract for the transportation of merchandise from one state into or across another involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several states, since it embraced a contract which must come under the laws of more than one state. The purpose of Congress to submit the incidental power to sell to the dominion of state authority should not *without the clearest implication be held to imply the purpose of sub-*

jecting to state laws a contract which in its very object and nature was not susceptible of such regulation even if the constitutional right to do so existed, *as to which no opinion is expressed.*"

In other words, this Court expressly left open the question, which is now presented by the Webb-Kenyon Act, of whether the importation of liquor can, by Congress, be divested of its interstate character.

On the same day the Rhodes case was decided. this court also rendered an opinion, in Vance vs. Vandercook, 170 U. S., 438, involving a statute of South Carolina under which that state had instituted prosecutions based on interstate shipments of liquors into South Carolina for the personal use of the consignees, to be sold to them at destination, and in the original package. The state was not, at the time, under absolute prohibition, but it had been sought to place the liquor traffic under a legalized government monopoly. The state law also permitted importation by a consignee for his personal use, but subjected such importation to certain regulation, including the procuring of a certificate from certain authorities. After holding that the right of importation for personal use was not subject to state regulation, it is said, with reference to the Wilson Act:

"And this right is wholly unaffected by the act of Congress which allows state authority to attach to the original package before sale but only after delivery. Scott v. Daniel, and Rhodes v. State of Iowa, *supra*. It follows that under the Constitution of the United States every resident of South Carolina is free to receive for his own use liquor from other states, and that the inhibitions *of a state statute* do not operate to prevent liquors from other states from being shipped into such state, on the order of a resident for his use."

The situation sums up, therefore, that prior to 1890,

the right to import liquors and the right to sell them after arrival in the original package, were held (Bowman vs. Chicago, Etc. Ry., 125 U. S. and Leisey vs. Hardin, 135 U. S.) to be derived from the Constitution of the United States in both cases.

Thereafter it was held (In re Rahrer), that Congress might divest the latter of its interstate protection, and that whether the former might be in like manner so divested was not passed upon. Rhodes vs. Iowa, *supra*. Vance vs. Vandercook then holds that the right of importation was, at that time, still derived from the Constitution, and exempt from inhibition by a state statute.

The validity of the Webb-Kenyon law will, therefore, be dependent on whether Congress, which has been held to have power to divest of its interstate character a sale the immunity of which from state regulation was previously derived "from the Constitution," can in like manner divest an importation of its immunity which is also derived "from the Constitution."

Being precluded by the holding of the Rahrer case as to sales at destination, the opponents of the Webb-Kenyon Act now seek to make a distinction between sales and transportation, on the theory that sale, being but an incident of such commerce, may be divested by Congress of the protection of interstate commerce while transportation, being interstate commerce in its fundamental aspect, may not in any manner or degree be so divested. As this court has twice refused to express any dicta as to its view of the latter question, it is a question upon which there is necessarily no direct authority.

Since the foregoing cases were decided, this court has held, however, in the lottery cases of Champion vs. Ames, 188 U. S., 356, that the transportation of lottery tickets, although the subjects of barter and sale and therefore comprising, in their sale and transportation, interstate commerce, might be entirely forbidden by

Congress. It had been very strongly argued that the constitutional right of Congress to regulate interstate commerce did not include the right to prohibit such commerce. In denying this contention, it was said (355):

> "If lottery traffic, carried on through interstate commerce, is a matter of which Congress may take cognizance and over which its powers may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on?"

And also (357):

> "In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, *Congress only supplemented the action of those states—perhaps all of them—which, for the protection of the public morals,* prohibited the drawing of lotteries, as well as the sale or circulation of lottery tickets, *within their respective limits.* • • • We should hesitate long before adjudging that an evil of such an appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce. What was said by this court upon a former occasion may well be here repeated: 'The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge.' Re Rahrer, 140 U. S., 545, 563."

The foregoing declaration of the power of Congress to, in effect, co-operate in protecting the several states from the evils of a traffic which they deem injurious to the morals of their citizens applies fully to the present situation, where Congress has decided to lend a like assistance to the suppression of the liquor traffic.

A similar holding is that of Hipolite Egg Co. vs. U. S., 220 U. S., 45, where the so-called Pure Food Law was held to have outlawed interstate shipments of adulterated eggs. To the same effect see Hoke vs. U. S., 227 U. S., 308, involving the White Slave traffic.

So long as some states want liquors to be transported into their territory and others do not, it is manifestly impossible for Congress, by a general act, to provide any regulation which will be just to both, which takes no account of diverse state laws. To do so would either permit all such importations, thereby nullifying the laws of the "dry" states, or else forbid them, equally nullifying the laws of the "wet" states. The latter course was adopted in the lottery case because Congress took the position that that traffic was so manifestly detrimental to public morals as justified its entire suppression, even as to importations into states which were themselves willing to receive it.

While Congress might, in like manner, have removed from the protection of interstate commerce *all* liquor shipments, indiscriminately, whether destined for a state whose laws would permit them or one in which such transportation is forbidden, it did not see fit to go to that length at this time. On the contrary, it took the more moderate course of forbidding, in its own name and authority (not that of a state), all shipments of liquor in certain cases and suffered them to continue in all other cases, and, in separating those shipments which it determined to outlaw from those which it did not, Congress adopted as an element or means of classification the test of whether such shipments would, if amenable to the laws of the state of destination, be lawful or unlawful. This is a manifestly reasonable basis of classification, and being adopted by Congress as a means of regulating a matter which it has full and exclusive power to regulate, is not open to objection. The contention that any regula-

tion which takes into account diverse state laws will result in as many different rules as there are states is not new, but has been urged on this court against the Wilson Act and other laws which withdrew the protection of interstate commerce from certain articles or traffics, and has uniformly been rejected.

The following quotations from the opinions of the Iowa and Kansas courts, upholding the constitutionality of the Webb-Kenyon Act, very clearly and forcefully state the proposition and are typical of the uniform course of reasoning by which all the courts which have yet construed the Act have arrived at a similar conclusion.

In State of Iowa vs. U. S. Express Co., 145 N. W., 451, it is said (458), after noting the power of Congress to put its ban on the interstate transportation of lottery tickets, liquor to the Indian tribes, game, diseased cattle, the White Slave traffic, etc.:

> "All of these and other like acts were passed to aid states which came within these provisions in enforcement of local laws which they deem of vital importance to their citizens; in other words, to aid them in enforcement of their police regulations. The act simply removes the bar theretofore existing to the enforcement of police regulations, because of the interstate character of the transaction, and, if it be within the power of Congress to forbid the shipment of all liquors in interstate traffic, no logical reason is perceived why it may not be less, and forbid the shipment under certain conditions.
>
> "There are no words of delegation in the act itself, and the theory of it undoubtedly is that liquors intended for use, contrary to state rules, should be an outlaw of interstate commerce, and neither the shipper nor the carrier may say that the state is interfering with interstate commerce, for the reason that the right of such shipments between the states is denied by Federal legislation."

The Kansas Court, in State vs. Doe, 139 Pacific, 1168, 1170, after quoting this court's statement, in the Rahrer case, that:

> "The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge."

Holds,

> "Intoxicating liquors belong to a class of commodities which may be made contraband at the will of Congress. Congress might, if it chose, altogether prohibit the transportation of such liquors in interstate commerce by placing them in the same category with lottery tickets, obscene literature, adulterated foods and drugs, diseased animals, and women and girls going from one state to another for immoral purposes."

And further, citing the holding of this Court in the Rharer case that Congress may divest of its interstate character a given kind of commerce at an earlier period than would otherwise be the case, said:

> "In essence and effect, and as its title indicates, the Webb-Kenyon law divests intoxicating liquors of their interstate character still earlier in the course of transportation than did the Wilson law, and exposes them to state regulations adopted pursuant to the police power immediately upon their entrance into the state to which they may be consigned. * * *
>
> "When Congress by virtue of its power to regulate commerce attaches to interstate movements of intoxicating liquors the special condition that they shall not be consummated for the purpose of violating the laws of the destination states, the regulation is the regulation of Congress. Nothing is delegated to the states, and the state laws operate as before, that is, subject to the paramount will of Congress,

albeit they extend to articles which were exempt from their operation before the adoption of the special rule."

THE WEBB-KENYON ACT CONTEMPLATES OTHER INTERESTS THAN THAT OF THE CONSIGNEE.

Our Kentucky Court of Appeals, in the case of Adams Express Co. vs. Commonwealth, 154 Ky., 462, considered the application of the Webb-Kenyon Act to personal use shipments into this state and held that such shipments had not been divested of their interstate character; this on the theory that the Act of Congress referred only to the intention of the consignee, whose receipt and possession for personal use is not punishable under local statutes. What they decided is best indicated by the court's own summary (474):

> "The result of our views on the whole case is, that whether a carrier of an interstate shipment of liquor subjects itself to punishment or not depends on *the use to which the person to whom it delivers liquor intends to put it.* If this use violates a law of the state, then the carrier may be punished; if it does not, the carrier has not committed any offense."

For some reason, the Commonwealth had conceded in the stipulation that the liquor which comprised the shipment in that case had been "purchased by the consignees at the place in Tennessee from which it was shipped, etc." Neither the question of the statutes making the place of delivery the place of sale, as to defendant, which was contended by the state in its brief, nor the interest of any party to the shipment, other than that of the consignee, which was not raised, was passed upon, the court's opinion being silent as to both and manifestly proceeding on the assumption both that the place of sale

was in Tennessee and also that the "sale" contemplated by the Webb-Kenyon law is a resale by the consignee after delivery, which is already covered by the Wilson Act. The court held the Act of Congress constitutional and reaffirmed its former holding that Section 2569-a of the Kentucky Statutes is also valid in all cases with reference to which it may be operative.

If the above explained assumptions of our Court of Appeals as to the proper interpretation of the Act of Congress, limiting the application of the term "any person interested" solely to the consignee and excluding any and all interest of the shipper or carrier be correct, then we must concede that their opinion as to the extent of the applicability of the Webb-Kenyon law, so construed, to our local statutes is difficult to assail.

If, however, their construction of the Act of Congress is too narrow and the intentions and interests of either the shipper or the carrier may also be taken into account, then, by the terms of their own holding, their position is not maintainable.

In justice to our Kentucky Court, it should be here stated that their construction has been approved and adopted by the Courts of Delaware, Tennessee, Texas, Alabama, North Carolina, Iowa and Kansas, and by a District Federal Court. On the other hand, Mississippi, South Carolina, another District Federal Court and the Circuit Court of Appeals for the fourth circuit have regarded such construction as so narrow as, in effect, defeating the purpose of the act by restricting the scope of its operation to a field which is, practically, already covered by the Wilson Act. All of these cases are reviewed in the brief of plaintiff in error and the particular facts of each set out, but the substance of their holdings is as above indicated.

The defenders of the "personal use" construction of the Webb-Kenyon law lay great weight on the cir-

cumstance that, under the Wilson law, shipments could be delivered to a known "bootlegger," whereas, under the present act, only bona fide personal use importations may be made. If such a theory would work out in actual practice, much could be said for this position.

It is notorious, however, that no such Utopian result is attained, nor can be as a matter of fact. Our own court, when confronted with this situation in the case of Adams Express vs. Commonwealth, 160 Ky., 66, harmonizes that decision with the "personal use" case of the same title, 154 Ky., 462, by stating that the carrier must use "ordinary care" not to deliver to anyone who will use the liquor unlawfully, but, having done so, it is not responsible. The effect of this holding is simply that, instead of ordering and receiving his liquors in person, the "bootlegger" now handles that feature of his trade through some agent who is not so well known to the local express agent and, consequently, to whom liquors may more safely be delivered in the "exercise of ordinary care." The assistance of the Webb-Kenyon law, so administered, in suppressing the liquor traffic in dry territory is strictly of a legal rather than practical nature.

The carrier also, under this interpretation of the act, is placed in the dilemma of being subject to suit for damages by shippers and consignees, if it refuses a shipment, and at the same time liable to criminal prosecution if it accepts it. On the same facts, the jury in a civil suit might very readily find for the plaintiff on the ground that the exercise of ordinary care would have justified transportation and delivery while another jury, in a criminal prosecution, could also sustain a criminal conviction, because, in their judgment, the same evidence showed that, in the exercise of ordinary care, delivery ought not to have been made.

Under these conditions, the necessity of having

some rule of practical and certain applicability is apparent. Sec. 2569-a of the Kentucky Statutes is that rule. Under it prohibition really prohibits, and yet this Court itself has already said of it, in L. & N. vs. Cook Brewing Company, 223 U. S., 70, that it is undoubtedly valid as a regulation of intrastate commerce. All that is now necessary is to so construe the Webb-Kenyon law that interstate shipments will be divested of such character to an extent that this statute may become operative as to them also.

As neither the construction placed by our Kentucky Court of Appeals on this Act of Congress, nor those of the other courts above quoted as taking either side of the question, are in this instance binding upon this Court in construing the act, any extended discussion or analysis of them, separately, would be profitless. Suffice it to say, in submitting this act to the only court which can authoritatively construe it, that it seems proper from every standpoint to give to the words: "Any person interested in such liquors" their usual and ordinary meaning, thereby rendering the Webb-Kenyon law a living, potent force in aid of the states whose prohibition laws Congress has sought to make really effective, rather than, by restricting the application of those words to only one of the persons interested, viz.: the consignee, to thus convert the Act of Congress into a legal scarecrow.

Typical of the reasoning by which the "strict construction" decisions have been reached is, for example, the case of Hamm Brewing Co. vs. C., R. I. & P. Ry., 215 Fed., 672, which holds:

> "The law of Iowa does, however, prohibit the transportation by any common carrier of intoxicating liquors, unless the person to whom the liquor is consigned has a permit. But the Webb-Kenyon Law, while it says that the liquor must not be received

possessed, sold or used in violation of law, *does not say that it must not be transported in violation of law.* If it had been the intention of Congress to prohibit the procurement from points outside the state by a citizen of Iowa of intoxicating liquors for his own personal use, it would have been very easy to have indicated that by prohibiting the transportation of *all* interstate shipments."

That court does not explain how, under such a provision as it suggests, the residents of non-prohibition states could then have procured importations of liquor, although having in force none of the prohibitory statutes which Congress, by the Webb-Kenyon Act, has sought to make operative.

Using the same character of reasoning as that above quoted, why did Congress not make the law, in so many words, depend solely upon the interest or intention of the consignee, if it was meant to be so limited? This would have been just as easy as forbidding "all" shipments and would not have disfranchised the electorate of the "wet" states.

There is no necessity of saying "Any person" if we mean but one specific person, and nobody else.

On a parallel with the Hamm Brewing Co. holding is the following from the case of VanWinkle v. State, 91 Atl., 385, in which the holding of the Delaware Court of General Sessions, in Grier v. State, 88 Atl., 579, that the carrier for hire had an interest in the shipment, was overruled:

"From this analysis of the law it is likewise apparent, first, that all shipments of liquors are not by express language prohibited; and, second, that the test of a shipment of the kind prohiibted is the intent of a person not interested in the shipment, *but interested in the liquor,* to receive, possess, sell or use the liquor in violation of the state law."

That the customary and usual use of the word "shipment" comprehends a reference to the article shipped as well as to the act of shipping does not require argument.

It is a universal rule of statutory construction that words are to be given their customary and usual meaning wherever possible, and also that judicial construction is not requisite unless some ambiguity or incompleteness requires it. This Court's rule on the subject is clearly stated in Dewey vs. U. S., 178 U. S., 510, 44 L. Ed., 1170 (1174). There the amount of a bounty to be paid was, by the Federal statute, made dependent on the relative force upon our ship and "the enemy's vessel." It was sought by the claimant to count not only the men on the enemy's ships but also those on batteries which had taken part in the battle of Manila, in support of the Spanish ships. While the latter were obviously within the spirit of the statute, as constituting a part of the force opposing our fleet, it was held that they were not within the literal purview of the act, it being said (521):

> "Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the government, so to depart from sound rules of construction as in effect to adjudge that to be law which Congress has not enacted as such. Here the language used by Congress is unambiguous. It is so clear that the mind at once recognizes the intent of Congress. *Interpreted according to the natural import of the words used, the statute involves no absurdity or contradiction, and there is consequently no room for construction.* Our duty is to give effect to the will of Congress as thus plainly expressed. U. S. vs. Fisher, 2 Cranch 358, 399, 21 Ed., 304, 317; Lake County vs. Rollins, 130 U. S., 662, 670, 21 Ed., 1060, 1063."

There is not a syllable in the Webb-Kenyon Act

which fairly, or at all, necessitates restricting the meaning of the term "any person interested" to the consignee alone and to the exclusion of any one else who may have any sort of interest in the liquor so shipped.

We are impressed with considerations by which the Court of General Sessions of Delaware (since reversed by the Supreme Court of Delaware) arrives at the conclusion, in the case of State vs. Crier, 88 Atlantic, 579, that "any person interested" means any person who is in fact interested, whether consignee, shipper or carrier. This court held (596):

> "We think the person to whom the liquor is given for transportation and delivery is interested therein within the meaning of the Federal law, and that if he intends when he receives, or has in his possession, the liquor, to carry it from a point in one state to local option territory in another state, into which the carrying is unlawful, the transaction is not protected by the commerce clause of the Federal Constitution, and is prohibited by the Webb-Kenyon law—it being a violation of the law of the state into which the liquor is carried. And it may also be said that if such person carries or delivers the liquor into local option territory where such carrying or delivery is unlawful, it is used by him in violation of the law of the state within the meaning of the Federal Statute.
>
> "If this conclusion is not correct then the Webb-Kenyon law furnishes no remedy at all for the evil it is designed to cure."

To the same effect see American Express Co. vs. Beer, Supreme Court of Mississippi, 65 Sou., 575.

That the carrier is interested in the shipment is undeniable. Not only has it a valid and enforceable lien for its express charges, but also, at all times while it has possession of the shipment for transportation and delivery, it is the party at whose sole risk the goods are held and who would sustain the loss in the event of their

destruction or conversion. During this period, the possession of the carrier is paramount even to that of the legal owner, whom they may sue to recover back the goods in the event of an unauthorized taking from the carrier's possession. (See Hutchinson on Carriers, Sec. 782 and cases cited). Also, if the goods be damaged or taken by a third party, the carrier may sue in its own name to recover the goods or to recover personally the extent of its own special interest. (Hutchinson on Carriers, *supra*).

In construing the meaning of "interest" the Connecticut court, for example, has even held that being under liability for the loss of property if destroyed constitutes an interest therein commensurate with that of ownership, as affecting insurability. See Hough vs. City Fire Ins. Co., 29 Conn., 10, 20. Certainly such liability will support some of the several degrees of legal "interest" less than ownership. As well stated by the court in the Grier case, *supra*:

> "Under the facts stated there can be no doubt that the loss of the liquor at any time in transit would have been the loss of the liquor dealer, and Conaway could have recovered back the purchase price which he had paid."

IT IS COMPETENT FOR THE LEGISLATURE TO MAKE THE PLACE OF DELIVERY THE PLACE OF SALE.

Section 2569-a of the Kentucky Statutes, above quoted, makes the place of delivery the place of sale as to the carrier. Our court, in applying this statute to intrastate cases, has always treated this provision as valid, without discussion.

The Supreme Court of North Carolina has, however, in the cases of State vs. Herring, 145 N. C., 418, 58 S. E., 1007, and State vs. Patterson, 134 N. C., 612, 47

S. E., 808, very fully explained how it is permissible thus to change the previous common law rule that the sale is consummated where the seller delivers the goods to the carrier, consigned to the purchaser.

In the Herring case, *supra*, affirming the Patterson case, it was held (421):

> "We see no reason, as a general proposition, why the legislature cannot make the place of delivery the place of sale as to all contracts entered into after the enactment of such a law; and certainly a statute of this kind is valid to the extent required for the proper exercise of the police power, as here. Page on Contracts, Sec. 1778; Freund on Police Power, Sec. 499; State vs. Goss, 59 Vt., 266."

We are aware that this statutory change of the pre-existing common law rule that the place of sale of a shipment by common carrier is the place at which the carrier receives it would not affect interstate shipments under the decision of this court in American Express Co. vs. Iowa, 196 U. S., 133. That case holds that it is not within the power of any state to impose such a statutory rule upon shipments which were, at that time, within the protection of the interstate commerce, but if the Webb-Kenyon law be constitutional, and operates to divest of their interstate character the shipments to which it refers, then the American Express Co. case is no longer applicable.

The only case arising under the Webb-Kenyon law in which this question has been specifically passed upon is the very recent case of State of West Virginia vs. Adams Express Company, 219 Fed., 794, decided January 13, 1915, decided by the U. S. Circuit Court of Appeals, Fourth Circuit, reversing the District Court for the Southern District of West Virginia. A statute of West Virginia, enacted after the passage of the Webb-Kenyon law, contained a provision similar to that of the

Kentucky Statute in that it made the place of delivery the place of sale.

With reference to this provision, the court said:

> "At the argument it seemed to be conceded that state legislation would be effective to make the place of delivery the place of sale, with respect to transactions within the scope of the state legislative power. The power of the state to enact laws regulating and controlling commercial transactions within its own limits, subject only to the condition that the regulations shall not arbitrarily impair property rights or interfere with interstate commerce, has been affirmed in Sinnot v. Davenport, 63 U. S., 227; Delameter v. South Dakota, 205 U. S., 93, and innumerable other federal and state decisions. 'The internal commerce of a state—that is, the commerce that is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the federal government.' Sands vs. Manistee River Improvement Company, 123 U. S., 228; Hart v. State, 87 Miss., 171, 39 So., 523, 112 Am. St., 437. This power includes the regulation of sales and the change of the general rule of the common law, that delivery to the carrier is a completion of the sale, into a general statutory rule as to every sale that it shall not be complete until delivery to the consignee, or into a special statutory rule that the sale of intoxicating liquors shall not be complete until delivery to the consignee, and that the place of delivery shall be the place of sale. The validity of such a special statutory regulation is illustrated in State v. Herring, 145 N. C., 418, 58 S. E., 1007, 122 Amer. St., 461, and State v. Patterson, 134 N. C., 612, 47 S. E., 808."

And also, with reference to the constitutionality of the Webb-Kenyon law and the claim that had been made that this court in Vance vs. Vandercook, *supra*, had announced a rule which would necessitate the hold-

ing unconstitutional of the present act of Congress, said (Opinion, page 14):

> "It is perfectly manifest that this language refers to the constitutional provision giving the Congress control of interstate commerce to the exclusion of the states, and not to the power of the Congress under the authority of the Constitution to exclude absolutely or conditionally deleterious substances.
>
> "As to intoxicating liquors, though universally recognized as deleterious, the Congress has not seen fit to exclude them entirely from interstate commerce, but has made the exclusion on this condition, namely, that they shall not be transported by common carriers into particular states when such transportation would be especially injurious to the public interest in that, when they reach the state, they will derange and make inefficacious the police measures for the control of intoxicants which the State has seen fit to adopt. The courts can hardly find room to doubt that this qualified exclusion made in aid of the efforts of a number of the states of the Union to combat one of the greatest evils of human life is founded on deep reason and enlightened public policy."

It is unnecessary, however, to extend this brief with further elaboration of authority or argument on the question of the statute's making the place of delivery the place of sale. If the Webb-Kenyon law places personal use shipments within the operation of state statutes by taking into account the intended violation of such statutes by the carrier, and not by the consignee alone, then the matter of the place of sale is one of cumulative rather than controlling importance. Since it is unlawful for a carrier to transport liquor into local option territory of Kentucky and there deliver it, the carrier's receipt, possession and use of the liquor for such purposes is with intent to violate the state law *so*

far as the carrier is concerned, thereby rendering the Act of Congress applicable to the transaction, entirely apart from the further and separate question of whether the carrier also intends to assist in consummating a sale at the place of delivery. This latter circumstance merely constitutes another and an additional reason why the Webb-Kenyon law applies.

At this juncture it may be well, also, to say that in asking a more liberal construction of the Webb-Kenyon law than has been placed upon it by our Court of Appeals, we have not submitted any proposition which, if sustained, would render the procurement of liquor in local option territory, for necessary and legitimate purposes, impossible. It would simply place under one uniform rule shipments from both non-resident and local dealers into local option territory. Under Sec. 2569-a a carrier for hire may bring intrastate liquor shipments into such territory to druggists and physicians, thereby providing for the sick or infirm whose supposed necessities are usually considered a bar to absolute prohibition. For the rest, who desire to keep and use liquors for their personal pleasure and comfort, which is held to be a constitutional right in Commonwealth vs. Campbell, 133 Ky., 50, and Commonwealth vs. Smith, 163 Ky., 227, our statute permits such persons to bring in liquor, upon their person or as baggage. They are further taken care of by the holding in Calhoun vs. Commonwealth, 154 Ky., 70, that one may also have liquor purchased anywhere it is being lawfully sold in the state and brought into local option territory, for his personal use, by an agent if the agent acts without compensation and has no interest in the liquor.

With these facts in mind, it can readily be seen that what our legislature has attempted to do is not to deprive the resident of local option territory of his constitutional right to keep and use liquor, but rather to

adopt the only course which experience has demonstrated will effectually suppress the bootlegger and the blind tiger, viz.: cutting off their base of supplies by eliminating the financially interested go-between, the common carrier for hire. The right to possess and use liquor in local option territory does not include the right, as the Calhoun case clearly indicates, to effect its importation through an interested agent who derives a financial profit from the transaction. This is what Section 2569-a of the Kentucky Statutes is aimed at and the construction of the Webb-Kenyon law for which we contend will operate simply to make that statute practically effective.

PERSONAL USE SHIPMENTS INTO KENTUCKY HAVE BEEN DIVESTED BY THE WEBB-KENYON LAW OF THEIR INTERSTATE CHARACTER AND ARE WITHIN THE OPERATION OF SECTION 2569-a.

As previously explained, both this court and the Kentucky Court of Appeals have already held Section 2569-a of the Kentucky Statutes, forbidding the transportation and delivery by common carrier of liquor shipments and making the place of delivery the place of sale as to the carrier, as valid as to all shipments as to which it may be operative.

Although held in L. & N. vs. Cook Brewing Co., *supra,* to be inoperative as to interstate shipments at the time of that decision, this court has also held in the Rharer case, *supra,* that when Congress removes an impediment to the operation of a state statute upon what was formerly exempt from its operation the statute becomes immediately effective without re-enactment. Consequently, since the transportation and delivery, by a carrier, of intoxicating liquor in local option territory in Kentucky is a violation of the state law and can be punished accordingly in all cases where the state law

is then operative, it follows that in receiving, possessing and using the liquor for the purpose of such transportation and delivery the *carrier* thereby intends to violate the law of Kentucky. While the use to which the *consignee* of such shipment may intend to put the liquor after it has been transported and delivered to him may be entirely lawful, this in no manner affects the illegality of the *carrier's* action under Sec. 2569-a.

In such a situation, the Webb-Kenyon law does not divest the shipment, if it be interstate, of its character as such if the *consignee's* intended receipt, possession and use be lawful, if his interest in the liquor be the sole criterion. On the other hand, it is equally clear, if the carrier's interest in the liquor—which we have shown exists—and its intentions relative thereto be within the purview of the Webb-Kenyon law, when construed by this court, that this shipment is divested of its interstate character by the Webb-Kenyon law, and, the state law having thus become operative as to it, the present conviction can be upheld.

Believing that the plain and unmistakable language of the Act of Congress require it to be so construed, we ask that the writ of error be denied.

Respectfully submitted,

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INDEX.

	Page.
STATEMENT OF CASE—QUESTIONS INVOLVED	1
a. Law of Kentucky	2-3
b. Webb-Kenyon Law	3
DOES AGREED STATEMENT OF FACTS CONSTITUTE AN OFFENSE?.	4
a. Construction of Webb-Kenyon Law	4-11
b. Construction of Kentucky Statute 2569-a	11
KENTUCKY ANTI-SHIPPING LAW MAKING PLACE OF DELIVERY PLACE OF SALE CONSTITUTIONAL	11
a. Valid as to Intrastate Shipments	13
b. Valid as to Interstate Shipments	16
c. Citizen of Kentucky No Right to Secure Liquor in Violation of Law	20
d. Purpose of Prohibitory Legislation to Prevent Use	25
e. Decisions Sustaining Similar Legislation	28
WEBB-KENYON LAW CONSTITUTIONAL	29
a. Power of Congress Over Interstate Commerce Plenary	29-31
b. Congress May Prohibit Entirely or Do Less	35
c. Articles Prohibited from Intersate Commerce	39
d. Congress' Power to Enact Laws Under Police Regulation	43

e. Same Power to Prevent Shipment of Liquor as Lottery Tickets.. 45
f. Liquor Traffic No Inherent Right to Exist Because of Inherent Evils in It 52
g. Congress Has Not Delegated Legislative Power 60
h. Congress Has Power to Enact Law Enforcement Legislation 67
i. Recent Decisions Sustaining Constitutionality of Act 73

CASES.

—o—

Page

Adams Express Company vs. Comm. 129 Ky. 420, p. 428..... 13
American Express Company vs. Beer, (Miss.) 580..... 36
Adams Express Company vs. Comm. 169 S. W. (Ky.) 603..... 80
Atkinson vs. Southern Express Company, 94 S. C. 444, 78 S. E. 516, 48 L. R. 9. (N. S.) 349..... 17
American Express Company vs. Beer, 65 Sou., 581..... 36
Addyson In re, 175 U. S. 211..... 43
Buttfield In re, 192 U. S. 470..... 40
Beebe vs. State, 6 Ind. 542..... 54
Bowman vs. Northwestern, 125 U. S. 500..... 30
Crowley vs. Christensen, 137 U. S. 86..... 56
Champion vs. Ames, 188 U. S., 356..... 31, 50
Delamater vs. South Dakota, 205 U. S., 93..... 16
Dinkius vs. State, 43 So. 114..... 70
Feibelman vs. State, 130 La. 122..... 70
Goddard vs. the town of Jacksonville, 15 Ill. 589..... 52
Hippolite Egg Co. vs. U. S. 220, U. S. 45..... 42
Hoke vs. State, 227 U. S. 309..... 44
Louisville & Nashville Ry. Co. vs. Cook Brewing Co., 223 U. S. p. 70 14
Mugler vs. Kansas, 123 U. S. 623..... 23
Ohio vs. Dollison, 194 U. S..... 39
Our House, No. 2 vs. The State, 4 Freem. (Iowa) 172..... 53
Phalen In re, 8 Howard, 161..... 44
Purity Extract Co. vs. Lynch, 226 U. S. 201..... 22
Palmer vs. Southern Express Co., 165 S. W. (Tenn.) 244.... 17, 74
Pennal vs. State, 123 N. W. Rep..... 72
Rahrer In re, 140 U. S. 562..... 30, 43
Reid vs. Colorado, 189 U. S. 137..... 41
State vs. Kansas, 80 Pac. 897..... 55
State vs. United States Express Co., 145 N. W. 458..... 60
State vs. Doe, 139 Pac. 1170..... 74
Southern Express Co. vs. State, 66 Sou. 115..... 35
State vs. Frederickson, 101 Me. 37..... 69
State vs. Walder, 83 O. St. 68, at p. 84..... 72
State ex rel vs. Crawford, 42 Am. Rep. 186, Supreme Court, Kansas 54
State vs. City Council, 42 S. C. 222 (20 S. E. 221)..... 56

Page

State vs. Cardwell, 81 S. E. 630..... 17, 84
Santo et al vs. State, 2 Iowa, 165, 190.....56
State vs. Herring, 145 N. C. 418, 58 S. E. 1007, 112 Am. St. Rep. 461 15
State vs. U. S. Express Co., Sup. Ct. Iowa, 145, N. W. Rep. 451—37
State vs. Doe, 13 Pac. (Kas.) 1169..... 38, 74
Southern Express Co. vs. State, 66 So. (Ala.) 115, p. 124..... 81
State vs. Forkner, 94 Iowa 1..... 62
Thurlow vs. Comm. 1 Mass., 5 How. 504..... 55
U. S. vs. Gallons Whisky, 93 U. S. 188..... 40
United States vs. Popper, 98 Fed. 423..... 42
United States vs. Cohn, 32 S. W. Rep. 38..... 68
United States ex rel F. Zimmerman & Co. vs. Oregon—Wash. R. & Nav. Co. 379..... 15
Vance vs. Vandercook, 170 U. S. 438..... 11
Van Winkle vs. State, 91 Atl. (Del.) 385..... 17
West Virginia vs. Adams Express Co., Fed. Rep. Vol. 219, No. 4, p. 794..... 7, 18, 28, 74
Woollen & Thornton on Intoxicating Liquors, Vol. 2, Sev. 699.. 12

No. 271.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1914.

Adams Express Company, Plaintiff in Error,
vs.
Commonwealth of Kentucky, Defendant in Error.

Error to the Circuit Court of Whitley County, Kentucky.

BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

Eighteen cases relating to the alleged violations of the law prohibiting the shipment and delivery of liquor into local option or dry territory, are involved in this hearing.

The assignment of errors relied upon by plaintiff in error are found upon page seven of their brief. In substance three questions are involved in this case.

1. Does the agreed statement of facts constitute an offense?

2. The validity of the Kentucky law making

the place of delivery the place of sale and prohibiting the shipping of liquor into dry territory.

3. The constitutionality of the Webb-Kenyon interstate liquor shipment law.

The law of Kentucky which was violated according to the agreed statement of facts is as follows:

> 1. It shall be unlawful for any person or persons, individual or corporation, public or private carrier, to bring into, transfer to other person or persons, corporation, carrier or agent deliverer, or distribute, in any county, district, precinct, town or city, where the sale of intoxicating liquors has been prohibited or may be prohibited, whether by special act of the general assembly, or by vote of the people under the local option law, any spirituous, vinous, malt or other intoxicating liquor, regardless of the name by which it may be called; and this act shall apply to all packages of intoxicating liquors whether broken or unbroken.
>
> Provided. Individuals may bring into such district, upon their person or as their personal baggage, and for their private use, such liquors in quantities not to exceed one gallon; and provided the provisions of this act shall not apply to licensed physicians or druggists to whom any public carrier may deliver such goods, in unbroken packages, in quantity not to exceed five gallons at any one time.
>
> 2. Each package of such spirituous, vinous, malt or other intoxicating liquor,

regardless of the name by which it may be called, whether broken or unbroken packages, brought into and transferred to other person, corporation, carrier or agent, delivered or distributed in such local option territory, shall constitute a separate offense.

3. Any person or persons, individual or corporation, public or private carrier, violating the provisions of this act shall be deemed guilty of violating the local option law, and shall be fined not less than fifty nor more than one hundred dollars for each offense.

4. And the place of delivery of such liquors shall be held to be a place of sale. Provided further, that the provisions of this act shall only apply to common carriers, corporations, firms or individuals who usually carry freight or goods for hire, and every firm, common carrier, corporation, or individual, who receives pay for conveying vinous, malt or spirituous liquors shall be deemed a violator of the provisions thereof.

The text of the Webb-Kenyon law in abbreviated form is as follows:

"Be it enacted, etc. That the shipment or transportation in any manner or by any means whatsoever of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind * * * from one State, * * * to another State * * * which said spirituous, vinous, malted, fermented, or other intoxicating liquors is intended, by any person interested therein, * * * to be

> received, possessed, or in any manner used, either in the original package or otherwise, in violation of any law of such State, territory or district of the United States * * * is hereby prohibited."

DOES THE AGREED STATEMENT OF FACTS CONSTITUTE A VIOLATION OF THE LAW?

In determining whether the agreed statement of facts constitute a violation of the law in this case, the first point to consider is the scope of the Webb-Kenyon Act. Does it apply only to the consignee? The language of the Webb-Kenyon law, used in its ordinary meaning, covers not only the consignee but the shipper and the common carrier who brings liquor into dry territory. The law says:

> "The shipment or transportation in any manner or by any means whatsoever of * * * intoxicating liquor from one state * * * to another State * * * which said * * * intoxicating liquor is intended by any person interested therein to be received, possessed, or in any manner used in violation of any law of such state, is hereby prohibited."

The substance of this law is that any transportation or shipment of liquor from one state to another intended by any person interested therein to be received in violation of any law of the State is prohibited. Plaintiff in error claims that this provision is limited to the consignee. The langu-

age used precludes the possibility of such construction, if the ordinary meaning of words is to be followed. The law says "which said liquor is intended by any person interested therein to be received, etc., in violation of law." Who are the parties interested in this liquor shipment? The liquor dealer who ships liquor, naturally is interested in it because he makes most of the profit out of it. The Express Company is interested in it because they act as agent for either buyer or seller in transporting the liquor into dry territory. They are paid for this work. If any one doubts the interest of an Express Company in the transportation of any commodity from which they get revenue, they can easily ascertain such interest by watching public hearings where these commodities are attacked. Be it said, however, to the credit of the Express Companies, many of them have indicated they would gladly be relieved from the carriage of intoxicating liquors and for the public good sacrifice the financial gain they receive from it. That they have an interest in the transaction covered in this litigation is clear.

It is first of all a money interest because of the pay they receive for the shipment. If the liquor is destroyed while in their care, they are held responsible for it. Under certain conditions they have a lien upon the liquor which they ship. The Express Company has an interest in this liquor unless by the words of the statute it is limited to the con-

signee. If Congress had intended it to apply only to the consignee, they would have used language very different from that found in the statute. Can anyone explain under the theory that the consignee only is meant why the words, "By any person interested therein" should be used? If the consignee only is to be included, the other language used is inconsistent with it. It is a well settled rule of construction that when all the terms of the statute can be construed together, giving their natural meaning, this should be done. (Black Interpretation of laws sec. 32). It is impossible to do this under the theory presented by the Plaintiff in Error.

The Court, also, should take into consideration in construing this statute the evil aimed at. The States were able to prevent the shipment of liquor into dry territory from within their borders. The Express Company, the shipper and the consignee were all held liable under these laws. The Webb-Kenyon law was enacted to hold to the same accountability the common carrier, and all other persons interested in the transaction when they performed the same act, which would be illegal if committed entirely within the state. It takes no strained construction of the Webb-Kenyon law to accomplish this purpose. In fact it takes a strained construction to prevent the accomplishment of this purpose.

In order to reach the evil aimed at the Federal

Government removed the protection of interstate commerce from shipments made into the State in violation of law. This was the only way the State could have any adequate protection in the enforcement of its laws. The Express Companies which participate in the profits of the shipment of liquor are not only interested in the transaction, but might with much propriety be called silent partners in the business.

The people in dry territory desired to have the liquor business eliminated. To that end the law prohibits the shipment of liquor into dry territory and any person interested in such shipment, or delivery is interested in the offense and in fact aids and abets the transaction.

We further submit for the consideration of the court that part of the law which prohibits any person interested in the liquor to have it received in violation of law. Under the authority of the state, the place of delivery can be made the place of sale; consequently, on receipt of the liquor the sale is made complete. Any person interested in the transaction which leads up to the delivery and the receipt, comes within the meaning of the clause which says: "which said intoxicating liquor intended by any person interested therein to be received * * * in violation of law."

The United States Circuit Court of Appeals in the case of West Virginia vs. Adams Express Company, Fed. Rep., Vol. 219, No. 4, p. 794, said concerning this point:

"The terms of the statute are so plain and unambigious that we are unable to perceive that its interpretation requires any resort to construction. The Wilson Bill withdrew the protection of interstate commerce from liquor and made it subject to the State law only after 'arrival and delivery to the consignee. But under that statute, after arrival and delivery to the consignee imported liquor fell within the category of domestic articles of a similar nature.' In Re Rahrer, Supra.

"The Webb-Kenyon Act is the result of a growing public conviction that it was an abuse of interstate commerce that even under the Wilson Bill liquor dealers in one state were protected in impairing or defeating the efforts of another state to root out or to minimize the evil of the use of liquor as a beverage. This statute prohibits the shipment or transportation of liquor from one state into another not only when it is intended to be sold in violation of any law of such state, but when it is to be received or possessed or in any manner used in violation of the State law. This is a direct recognition of the right of the State to prohibit the receipt or delivery, as well as the possession and use of liquor, without trespassing upon the power of Congress to regulate interstate commerce. The State of West Virginia has enacted with reference to a contract for the sale of liquor that 'the sale thereof shall be deemed to be made in the county wherein the delivery thereof

> if made by such carrier to the consignee,' and it expressly forbids a sale within the State. This makes the receipt or delivery have the effect of a sale and in forbidding the sale it forbids the receipt or delivery, which under the statute is the consummation of the sale. Thus it appears that the transportation and delivery already made in this case and the transportation and deliveries contemplated for the future fall within the express description of the transactions from which the Congress intended to withdraw the protection of interstate commerce. Any other construction would not only distort the language, but continue the obstacles to the enforcement of State Prohibition laws which it was the manifest intention of the Congress to remove." * * *

We have given in another part of this brief the reasons why the Webb-Kenyon law has removed the barrier which prevented the enforcement of the law against interstate shipments. If the State may prohibit the shipment of liquor into dry territory and make the place of delivery the place of sale, as Kentucky has done, and the interstate barrier is removed, then an interstate shipment by a common carrier is clearly a violation of the law. Under the law of Kentucky, sec. 2569a, the only way that an individual can secure liquor legally for his own use in dry territory is by carrying it into such territory, or bringing it in as a part of his personal baggage, or as indicated in the case of

Calhoun, 25 Comm. 154, Ky. p. 70. If a construction is placed on this law, that within the state, shipments of liquor into dry territory may be entirely prohibited, while the same shipments may be made legal through means of interstate commerce, then the state is left without protection in her effort to enforce law against a well recognized evil.

The vital point in this case is not whether the agreed statement of facts violates the plain letter of the law in Kentucky, but whether the law prohibiting the shipment of liquor into dry territory and making the place of delivery the place of sale, is a constitutional statute.

As we have shown in another part of the brief the question is settled, so far as intrastate shipments are concerned. We have also set forth the reasons why the passage of the Webb-Kenyon law has made law-enforcement possible against liquor shippers who use interstate agencies of commerce, as well as those from within the state.

By the agreed statement of facts the liquor was an interstate shipment via Adams Express Company to an individual for his own use in dry territory.

The law of Kentucky, section 2569a, clearly prohibits such shipment of liquor as set forth in the agreed statement of facts, unless the interstate commerce clause of the Constitution protects an act which is illegal when shipped from one point to

another in the state, but legal and protected by the Federal Government when shipped from outside the state.

* * * * * *

II.

THE KENTUCKY STATUTE PROHIBITING THE SHIPMENT OF INTOXICATING LIQUOR FOR BEVERAGE PURPOSES INTO DRY TERRITORY AND MAKING THE PLACE OF DELIVERY THE PLACE OF SALE IS A VALID AND CONSTITUTIONAL ENACTMENT.

A copy of the Kentucky statute has been set forth in this brief, also in the brief of opposing counsel. It prohibits the shipment of liquor for beverage purposes by common carriers into dry territory and makes the place of delivery the place of sale. This kind of legislation has been uniformly upheld, even before the enactment of the Webb-Kenyon law so far as it related to intrastate shipments.

Opposing counsel base their claim for the invalidity of this act upon statutes enacted and Court decisions rendered before the enactment of the Webb-Kenyon law. They also quote Vance vs. Vandercrook, 170 U. S. 438, as authority for the proposition that a citizen under the Federal statute has a right to bring in liquors for his personal use. The law has been changed since that decision.

In the case of Atkinson vs. Southern Railway Company supra, the Supreme Court of South Carolina refers to this Vance case and distinguishes the application of that case since the enactment of the Webb-Kenyon act. The United States Circuit Court of Appeals, also, distinguishes Vance vs. Vandercrook case from laws similar to the one before this court for consideration.

It always has been the law that there must be a delivery, actual or constructive, to complete a sale. When the seller does the last act in the completion of the sale, that determines the situs of the sale. In ordinary transactions the delivery of the liquor to the consignee would make that place the place of sale. Woolen and Thornton on Intoxicating Liquors, Vol. 2, Sec. 699, sets forth the rule as follows:

> "No sale or gift is complete unless there was a delivery, either actual or constructive. The vendor must lose his dominion, as it were, over the liquor sold and the purchaser must be vested with dominion over it. Unless this is done, there is no sale and no offense is committed. Riley v. State, 43 Miss. 397; Excise Commissioners v. Merchant, 34 Hun. 19 affirmed 103 N. Y. 143; Smith v. State 91 S. W. 592. And in some States proof of the delivery is by statute made sufficient proof of the actual sale. State vs. Prescott, 67 N. H. 203."

The liquor interests, who are past masters in devising schemes to evade the law, took advan-

tage of the ruling of the Courts that the title could pass at an earlier point than the point of delivery, if that was the intention of the parties. Consequently, dealers who shipped liquor into dry territory did so with the verbal understanding, or written agreement between the parties, that the sale is made in wet territory. In this way the law was successfully evaded. The officer of the law was compelled to wait until the liquor arrived in dry territory, and then ferret out the illicit sales by the bootlegger and speakeasy keeper. This was a difficult task. In order to aid the officers in the enforcement of law, the States enacted statutes making the place of delivery the place of sale. These laws have been uniformly upheld as to intrastate shipments, and since the enactment of the Webb-Kenyon law they apply to interstate shipments.

In the case of Adams Express Company against the Commonwealth, 129 Kentucky, 420, the Court held the company guilty under section 2569a of the Kentucky statute, of bringing and delivering liquor into local option territory. This shipment was made from a point in Nelson county, Kentucky, to Springfield, Kentucky, entirely intrastate. The court in upholding the statute, at page 428, said:

> "But the statute in question here is not for the benefit of commerce. It rests upon a different conception. The Legislature is aiming to protect men, women and children

> from the vice of an article of commerce which is deemed by the Legislature an evil, and in so doing they have attempted to put a check upon a vehicle of commerce. The legislation is anti-commercial. It puts the peace and good order of society above its commerce in this particular. In construing and applying the statute, if the Courts devitalize it by subordinating it to the supposed interest of commerce, the manifest legislative intent would be frustrated, which is contrary to every allowable rule of statutory construction."

So far as the law related to intrastate shipments, this court sustained the validity of the Kentucky statute before the enactment of the Webb-Kenyon law in the case of the Louisville and Nashville Railroad vs. Cook Brewing Company, 223 U. S., page 70, in the following language:

> "Valid as the Kentucky legislation doubtless was as a regulation in respect to intrastate shipment of such articles, it was most obviously never an effective enactment insofar as it undertook to regulate interstate shipments to dry points."

This decision was rendered before the enactment of the Webb-Kenyon law and, of course, is not binding in this case. Opposing counsel also refer to the recent case of Kirmeyer vs. Kansas. This case throws no light upon the case at bar, as the Court distinctly said that the Webb-Kenyon

act was not under consideration in the decision of that case.

The State of North Carolina, by its statute, made it unlawful to sell intoxicating liquors in dry counties. The legislature of that State made the place of delivery the place of sale. The question arose whether this could be upheld. The Supreme Court of the State of North Carolina, in the case of State v. Herring, 145 N. C. 418, 58 S. E. 1007, 122 Am. St. Rep. 461, held:

> "A statute making the sale of intoxicating liquors unlawful within a certain county and declaring that the place of the delivery of the liquors within such county shall be the place of sale is constitutional and valid as a police regulation. If a statute makes it unlawful to sell intoxicating liquors within a certain county, the legislature has constitutional power to make the place of delivery the place of sale, as to all contracts entered into after the enactment of such a law."

The opinion in this case is short, but it is clear, and is supported by citations from such well-known authorities on contracts as Page on Contracts and Freund on Police Power. Additional authorities are cited in the note to the opinion in 122 Am. St. Rep. 461. To somewhat like effect is the case of Hart vs. State, 87 Miss., 171, 39 So. 523, 112 Am. St. Rep. 437, and authorities in the digest's note in the Am. State Reports. In the case of U. S. ex rel F. Zimmerman & Co. v. Ore-

gon-Washington R. & Nav. Co., mandamus was sought to compel the railroad company to receive shipments of liquor for transportation into certain dry counties, in the state of Idaho. Judge Bean, in his opinion (beginning near the bottom of page 379), says:

> "The Supreme Court of the United States held, in Mugler vs. Kansas, 123 U. S. 662, 8. Sup. Ct. 273, 31 L. Ed. 205, that a State might lawfully prohibit the manufacture of intoxicating liquors for the personal use of the manufacturer, if in the judgment of the law-making power such manufacture would tend to cripple or defeat the effort to guard the community against the evils arising from the excessive use of such liquors, and that the Courts should not, upon their views of what is best and safest for the community, disregard the legislative determination of that question.
>
> "If for the reason stated a State may lawfully prohibit the manufacture of intoxicating liquors for the personal use of the manufacturer, why may it not for the same reason lawfully prohibit the transportation thereof for the individual use of the consignee? The question in either case would seem to be one of public policy, the determination of which belongs to the law-making power and not the courts."

The Supreme Court of the United States, in Delameter v. South Dakota, 205 U. S. 93, said:

> "The general power of the States to control and regulate within their borders the

> business of dealing in or soliciting orders for the purchase of intoxicating liquors is beyond question."

Counsel for the express company rely on Van Winkle v. State, 91 Atl. 385, Palmer v. Express Co., 165, S. W. 236, and Express Co. v. Commonwealth, 169 S. W. 603. These cases, as well as some other similar State decisions cited, are only persuasive, not binding on this Court. We submit that for persuasive reasoning the three foregoing cases are not so convincing as the opinions of the General Sessions, Court in State v. Greer, 88 Atl., 579, State v. Van Winkle, 88 Atl. 807, Express Co. v. Beer, 65 So. 115, U. S. ex rel v. Nav. Co., 210 Fed., 378; Atkinson v. Express Co. 48, L. R. A. (N. S.) 349. Precisely in point is the unanswerable reasoning of Chief Justice Clark in the concurring opinion in State v. Cardwell, 81 S. E. 630. See also Commonwealth v. Burgett, 136 Mass., 450, and Commonwealth v. Hugo, 164 Mass., 157.

It may be said that the Supreme Court of the United States in Adams Ex. Co. vs. Ky., 206 U. S. 138, declared ineffective a statute of Kentucky forbidding delivery of interstate C. O. D. shipments. That is true. But such decision was before the enactment of the Webb-Kenyon act.

Since the enactment of the Webb law the reason given in Adams Exp. Co. vs. Comm. 124 Ky. 160 should apply to an interstate shipment.

"It goes without saying, however, that if, by the instrumentality of such transactions as we have under discussion, whisky can be introduced and sold by retail through the aid of the express company, which makes itself the agent to deliver the spirits and collect the pay therefor, the law is reduced to a nullity. We do not believe that an express company can legitimately thus thrust the shadow of its greed between the people and their uplift."

The precise question raised in this litigation came before the U. S. Cir. Court of Appeals (Fed. Rep., Vol. 219, No. 4, April 1, 1915, p. 794). In a well-considered case, the court there held:

"At the argument it seemed to be conceded that State legislation would be effective to make the place of delivery the place of sale, with respect to transactions within the scope of State legislative power. The power of the State to enact laws regulating and controlling commercial transactions within its own limits, subject only to the condition that the regulations shall not arbitrarily impair property rights or interfere with interstate commerce, has been affirmed in Sinnot v. Davenport, 63 U. S. 227; Delameter v. South Dakota, 205 U. S. 93, and innumerable Federal and State decisions. 'The internal commerce of a State —that is, the commerce that is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the Federal governmen.' Sands v. Manistee River Improve-

ment Company, 112 Am. St. 437. This power includes the regulation of sales and the change of the general rule of the common law, that the delivery to a carrier is a completion of the sale, into a general statutory that the sale of intoxicating liquors shall not be complete until delivery to the consignee, and that the place of delivery shall be the place of sale. The validity of such special statutory regulation is illustrated in State v. Herring, 145 N. C. 58, S. E. 1007, 122 Amer. St. 461, and State v. Patterson, 134 N. C. 612, 47 S. E., 808.

"There is nothing in the amendment of the State Constitution that takes away by implication this power of the Legislature to provide that the place of delivery shall be the place of sale. It is true that the constitutional amendment prohibits 'the manufacture, sale and keeping for sale' of liquors, but it does not indicate a purpose to deprive the legislature of the power to determine what shall be considered the place of sale. Even if it be assumed that the framers of the amendment, in prohibiting the sale of liquor, had in view the general common law rule that the sale was to be considered made out of the State on delivery to the carrier and intended to incorporate that conception of a sale into the prohibition of the organic law of the State as a permanent State policy, that by no means implies an intention to take from the legislature the power to make other regulations and restrictions to be conveniently altered or added to or repealed from time

> to time as circumstances might require, but not considered proper to be imbedded in the Constitution as a permanent law of the State. This obvious and general principle was applied to constitutional and statutory provisions as to the liquor traffic in State v. Hooker (Okla.) 98 Pac. 964."

A CITIZEN OF KENTUCKY HAS NO CONSTITUTIONAL RIGHT TO RECEIVE AND POSSESS INTOXICATING LIQUOR FOR HIS OWN USE EXCEPT AS PROVIDED BY LAW.

Opposing counsel attempt to show that the authors of this measure did not intend to prohibit interstate shipments for personal use by means of the Federal law. Certain extracts are quoted from the Congressional Record to corroborate this claim. It is true that the Webb Kenyon law did not prohibit the shipment of intoxicating liquor into a State for personal use unless the State enacted legislation which would accomplish that result. In the lower Court, opposing counsel in one of these cases, after quoting parts of the Congressional Record, also printed the following in their brief:

> "Representative Webb addressed the following communication, which is now in possession of counsel for appellant, to a correspondent in Cincinnati who had inquired of him the purpose and intention of

the law as affecting shipments for personal use:

"'Washington, D. C.
March 31, 1913.

"'Dear Sir:

"'Replying to your letter of March 24th, I beg to say that the bill of which I am the author prohibiting the shipment of liquor intended to be used, received or sold in violation of the law of the State does not prohibit anything except that which the State prohibits, and if the State prohibits the receipt or possession of liquor for individual or personal use and such law is constitutional in the State, then my interstate shipment bill would prohibit the shipment of liquor for such purposes. My bill simply gives the States the right to prohibit whatever they think just and proper. It leaves the question entirely to the States to control the liquor traffic as they please.

"'Very truly yours,
"'E. Y. WEBB.'"

This statement of the author of the bill represents the facts. The shipment of liquor into dry territory in a State for personal use would not be interfered with unless the State passed laws making it impossible for an individual to get liquor for such use.

It is also claimed by plaintiff in error that a citizen of Kentucky has a constitutional right to receive and possess intoxicating liquor for his own use. No specific provision in the Constitution has

been pointed out to uphold this claim. The Kentucky statute, however, does not prohibit the use of liquor if it is secured by a method not prohibited by law. If a person has a constitutional right to purchase intoxicating liquor for his own personal use, the seller has a constitutional right to sell it to a person for such purchaser's personal use.

It is settled beyond the question of a doubt that no one has a constitutional right to sell intoxicating liquors. Such a right is not guaranteed to him by the Constitution of the United States, or of any State. Crowley vs. Christensen, 137 U. S., 89—The person who sells liquor to a purchaser, sells for the purchaser's own use, and yet a State has the power to deprive him of his alleged constitutional right to purchase liquor by prohibiting anyone to sell liquor to him.

In Purity Extract Company v. Lynch, 226 U. S. 201, in regard to the prohibiting the sale of certain beverages, not spirituous liquors, the Supreme Court said:

> "That the State in the exercise of its police power may prohibit the selling of intoxicating liquor is undoubted. Bartlemeyer v. Iowa, 18 Wall., 129; Boston Beer Co. v. Mass., 97 U. S., 25; Mugler v. Kansas, 123 U. S., 623; Kidd v. Pearson, 128 U. S., 1; Crowley v. Christensen, 137 U. S. It is also well established that, when a State exercising its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures

having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous, it may not be excluded in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. Booth v. Illinois, 184, U. S. 425; Otis v. Parker, 187 U. S. 606; Ah Sing v. Wittman, 198 U. S. 500; New York ex rel Silz v. Hesterberg, 211 U. S. 31; Murphy v. California, 225 U. S. 623.

"With the wisdom of the exercise of that judgment the Court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature, a notion foreign to our constitutional system."

The case of Mugler v. Kansas, 123 U. S. 623, in which the opinion is written by Justice Harlan, completely answers and refutes all arguments advanced by the plaintiff in this case. In the Mugler case, Mugler was indicted and convicted for manufacturing liquor for his own personal use. Justice Harlan, for the Court, says:

"And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use as a bev-

erage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the Courts upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of Prohibition as embodied in the Constitution and laws of Kansas might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs anyone's constitutional rights of liberty or of property when it determines what the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured in our government by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the lawmaking power, upon reasonable grounds, declares to be prejudicial to the general welfare. Crowley v. Christensen, 137 U. S. 86."

This opinion of the Supreme Court of the United States has been repeatedly quoted with

approval and reaffirmed. It would seem, therefore, to be conclusive that if a person may not manufacture liquor for his own personal use, and that there is no constitutional right so to do—then such person has no constitutional right to purchase or receive liquor for his own personal use, especially when such purchase or receiving is a violation of law by the person selling or delivering the liquor.

THE PURPOSE OF ALL LEGISLATION LIMITING AND PROHIBITING THE SALE OF LIQUOR IS TO DISCOURAGE AND PREVENT ITS USE.

Opposing counsel, and a limited number of lower Courts, have assumed that the State did not want to interfere with the use of liquor because statutes have not been passed, [redacted] specifically prohibiting the use of liquor or the purchase of liquor. There is a good reason why the States have followed the policy outlined.

The government has found that the best way to prevent the use of liquor is to cut off the means for furnishing the liquor to the individual for his use. When the law prohibits the sale of liquor, many people who have heretofore used it, discontinue its use. In many places the people have found it necessary to prohibit the furnishing and giving away of intoxicating liquor. This further discourages and prevents the use.

In order to meet the many evasions of the law,

still other legislation was required. If anyone had a constitutional, inherent right to use liquor, then all of these laws which prevent the sale and furnishing of liquor would be unconstitutional. On the other hand, all of these laws prohibiting the sale or furnishing of intoxicating liquors have been upheld. If a State finds that it is necessary, in order to eliminate the further use of liquor, to prohibit the shipment of liquor into dry territory and make the place of delivery the place of sale, the same reason which sustained the former laws upholds this legislation.

Now the liquor interests claim they have a constitutional right to send their liquor into Prohibition territory from outside States.

In each of these units of government, the people desired to have the sale, furnishing and distribution of liquor prohibited as a means to prevent its use. The liquor interests used every subterfuge possible to break down the law and then boast about the failure of the Prohibition policy adopted under the law.

Patiently but determinedly those who are fighting to promote the public welfare have asked for new legislation to meet each subterfuge and evasion on the part of the liquor interests. Each new law has been opposed on the basis that it brings a hardship upon the liquor interests. A casual observation of the whole situation shows that the liquor dealers who complain about these

laws are responsible for them. If they would allow the people in each unit of government to have the law enforced as it was intended, some of the laws of which they now complain would probably never have been needed. As soon as a unit of government votes dry, the wholesale dealer from the outside floods the mails with letters soliciting orders for liquor. The States then pass laws prohibiting such solicitation. The liquor dealers then used the public press advertising in dry territory. Laws had to be enacted forbidding this. Then billboards were used and circulars not directed to anyone, claiming these were not solicitations for orders of liquor. Every device which the human mind could invent has been used to break down these laws. In order to have protection, the people in dry territory have been compelled to ask for legislation preventing the shipment of liquor into such territory and making the place of delivery the place of sale.

There is another reason why the government is justified in prohibiting the means of furnishing liquor to individuals and not prohibit its use. If the law prohibits the use and purchase of liquor, where would a State find its witness to prosecute the real offender—the man who sells the liquor and makes the profit from it? In all legislation, we find that the aggressor is the one who makes profits from the alleged harmful practice or business. If it were unlawful to purchase liquor, or

use it, every witness who took the witness stand would be a self-confessed criminal, and it would be impossible to bring about a conviction. It is difficult enough for a State in these cases to secure evidence which satisfies the Court in all instances. If the law were framed as its opponents indicate it should be, in order to prohibit the use, then the law would be a nullity, and it may be this is the reason why it is proposed.

For years the representatives of the liquor interests have asked that in dry territory the law should specifically prohibit the use of liquor. They know that, with such a law, enforcement would be practically impossible.

The strongest reason for prohibiting the sale or distribution of liquor is to discourage and prevent its use. There can be but one purpose in passing these laws, and that is to prevent the use of intoxicating liquor.

The United States Circuit Court of Appeals, 4 Cir. Fed. Rep. Vol. 219 No. 4, April 1, 1915, said on this question:

> "In trying to comprehend the legislative purpose in prohibition statutes it is important to remember that the ultimate end sought in prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, but the prevention of their consumption as a beverage. The sale being the most usual and obvious means by which drinking is accomplished, legislation is more

often directed against the sale. But it is upon the recognized evil of individual consumption as a beverage that the right of a State under its police power rests to enact prohibitive legislation; and in the exercise of that right it cannot be denied that the State may legislate not only against acts which would constitute a sale at common law, but against other acts within its borders, such as deliveries by common carriers, which tend to defeat or weaken its public policy of preventing the consumption of liquor as a beverage."

III.

CONSTITUTIONALITY OF WEBB-KENYON LAW.

POWER OF CONGRESS TO ENACT LAWS REGULATING INTERSTATE COMMERCE IN INTOXICATING LIQUORS.

Article 1. Section 8, clauses 3 and 18, set forth the power of Congress to enact laws regulating interstate commerce. They read as follows:

> "To regulate commerce with foreign nations, among the several States, and with the Indian tribes."

And

> "To make all laws which shall be necessary and proper for carrying into execution the power given."

For half a century prior to 1888, the Courts recognized the jurisdiction of the state over interstate

shipments of liquor from the time they entered the state, the same as other domestic liquors. This policy was reversed in the case of Bowman vs. Northwestern, 125 U. S. 500, and in the subsequent case of Leisy v. Hardin, 135 U. S. 124. In reversing this policy, the Court predicated its pronouncement, not upon the inability of Congress to act in the premises, but on the ground that inasmuch as Congress had enacted no law restricting or limiting interstate commerce, it was its desire "that such commerce shall be free and untrammeled."

Subsequently in the Re-Rahrer case, 140 U. S. 562, which determined the constitutionality of the Wilson act, the Court said:

> "The difference of opinions which have existed in this tribunal in many leading cases upon this subject have arisen, not from a denial of the power of Congress when exercised, but upon the question whether the inaction of Congress was not of itself equivalent to the affirmative interposition of the bar to the operation of an undisputed power possessed by the States. We recall no decision giving color to the idea that when Congress acted its action would be less potent than when it kept silent."

The doctrine is freely and repeatedly announced that in the absence of any declaration on the part of Congress to the contrary, commerce is free and the State can impose no restraint upon an imported article until it becomes mingled with common

masses of property within the State. The reverse of this proposition is declared by the Courts with equal emphasis—that the responsibility is upon Congress to determine how far commerce shall be free, and what restrictions and limitations, if any, shall be placed upon it. The court said in the Rahrer case, p. 555:

> "The Constitution does not provide interstate commerce shall be free, but by the grant of this exclusive power to regulate it, it was left free except as Congress might interpose restraint."

CONGRESS HAS POWER TO ELIMINATE DELETERIOUS COMMODITIES FROM INTERSTATE COMMERCE.

There is ample authority for the proposition that any article of commerce which is detrimental to public morals may be eliminated from commerce entirely.

The Supreme Court recognized this principle of legislation, when it upheld the action of Congress forbidding the interstate traffic in lottery tickets in the following language: 188 U. S. 356.

> "We have said that the carrying from State to State of lottery tickets constitutes interstate commerce, and that the regulation of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is in effect a prohibition of the carriage of such articles from State to State is not a

fit or appropriate mode of regulation of that particular kind of commerce? If lottery tickets carried on through interstate commerce is a matter of which Congress may take cognizance, and over which this power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the States, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that question out of commerce among the States?"

Again:

"In determining whether regulations may not under some circumstances properly take the form of or have the effect of prohibition, the nature of the interstate traffic which it was sought to suppress cannot be overlooked."

Again:

"If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is

complete in itself, and is subject to no limitations except such as may be found in the Constitution. What provision in that instrument can be regarded as limiting the exercise of the power granted? What clause can be cited which, in any degree, countenances the suggestion that one may, of right, carry or cause to be carried from one State to another that which will harm the public morals?"

"But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to public morals. . . .

"In legislation upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which for the protection of public morals prohibited the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It is said, in effect, that it would not permit the declared policy of the States which sought to protect their people against the mischiefs of the lottery business to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to

that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce.

"If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offense to cause lottery tickets to be carried from one State to another, we know no authority in the Courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and State legislation in the early history of the country, has grown into disrepute and has become offensive to the entire people of the nation. It is a kind of traffic which no one can have the right to engage in."

Attorney-General Wickersham, in his opinion as to the Webb-Kenyon bill given President Taft, says:

"In the recent decision of Hoke v. United States (24 February, 1913), the Supreme Court in upholding the constitutionality of the Mann White Slave Act of 25 June, 1910 (36 Stats., 826), put the power squarely upon the Commerce Clause and the right of prohibition of 'a right to be exercised in immorality' on the same basis as the laws prohibiting the carrying of obscene litera-

> ture or lottery tickets or cattle with infectious diseases. It may be admitted that under the authority of these decisions Congress might, if it chose, prohibit the carriage in interstate commerce of intoxicating liquors in the exercise of its power to regulate such commerce."

It must be concluded that Congress in the lawful exercise of its powers under the Commerce Clause, may prohibit the transportation of liquors, and that such statute would be constitutional.

CONGRESS MAY DO LESS THAN ENTIRELY PROHIBIT THE TRAFFIC FROM INTERSTATE COMMERCE.

In discussing this question, the Supreme Court of Alabama, in Sou. Ex. Co. vs. State, 66 Southern 122, said:

> "While intoxicating liquor is property and an object of constant commerce, it is, as we have already said, an article which is made the subject of some kind of police regulation in every State of the Union. These police regulations are not, it is true, uniform in the various States, but all the States have them. There is, therefore, a field for the operation of the Webb-Kenyon law in every State of the Union; and if the Federal Constitution, under which the government was established, and which, to use the language of the Supreme Court of the United States in the Legal Tender cases, 110 U. S. 241, 14 Sup. Ct. 122, 28 L. Ed. 204, was 'intended to endure for ages and to be

adopted to the various crises of human affairs, and not to be interpreted with the strictness of a private contract,' then it would seem that, in adopting the Webb bill, Congress was exercising, not an implied, but an express power conferred upon it by the Constitution."

And on page 124 of the same opinion:

"The power to control includes the power to limit. Congress, in the Webb law, has simply placed a limitation upon commerce, insofar as intoxicating liquors are concerned, and as a part of such limitation requires common carriers to refuse to accept for transportation, or to deliver to the consignee that which is 'forbidden commerce.' "

In the case of American Express Company vs. Beer, 65 Sou., on page 581, the Court said:

"While the authority of the license cases has been weakened and on some points entirely overthrown by a number of later cases of which Bowman vs. Chicago, etc., supra, and Leisy vs. Hardin, supra, are a type, in none of them was this statement of Congress's power by Chief Justice Taney challenged, and in all of them the power of Congress to prescribe what commodities shall be legitimate subjects of interstate commerce was expressly conceded. A power to wholly exclude a commodity from interstate commerce necessarily embraces within it the power to exclude it partially or when certain conditions exist. Wickersham vs. Rahrer, 140 U. S. 545; 11 Sup. Ct. 865;

35 L. Ed. 572. Therefore, it seems clear that Congress was well within its power in declaring it would be unlawful to transport into a State intoxicating liquor that is intended by any person interested therein to be received, possessed, sold, or in any manner used * * * in violation of any laws of such state," and on page 582 we find:

"It is true that misery, pauperism and crime largely 'have their origin in the use or abuse of ardent spirits, * * * that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drink, * * * that the idleness, disorder, pauperism and crime existing in this country are, in some degree at least, traceable to this evil,' and since 'there is no inherent right in a citizen to sell intoxicating liquors,' it not being 'A privilege of a citizen of the State or a citizen of the United States,' it would seem that the power of Congress to declare that it is not a legitimate subject of interstate commerce is beyond question."

In the case of State vs. U. S. Express Company, 145 N. W., on page 458, the Iowa Court said:

"There can be no doubt that Congress, in virtue of its power over interstate commerce might, in its discretion, put its ban upon all transportation of liquors in interstate shipment, just as it has done with lottery tickets, the shipment of liquor to Indians, the method of shipment by express companies, the shipment of game, the car-

riage of infected live stock, the white slave traffic, etc. All of these and other like acts were passed to aid States which came within these provisions in the enforcement of local laws which they deemed of vital importance to their citizens; in other words, to aid them in the enforcement of their police regulations. The act simply removes the bar theretofore existing to the enforcement of police regulations, because of the interstate character of the transaction, and, if it be within the power of Congress to forbid the shipment of all liquors in interstate traffic, no logical reason is perceived why it may not do less, and forbid the shipment under certain conditions."

In the case of State vs. Doe, 139 Pac., on page 1170, the Supreme Court of Kansas said:

"Intoxicating liquors belong to a class of commodities which may be made contraband at the will of Congress. Congress might, if it chose, altogether prohibit the transportation of such liquors in interstate commerce by placing them in the same category with lottery tickets, obscene literature, adulterated foods and drugs, diseased animals, and women and girls going from one state to another for immoral purposes. * * * The plenary power of Congress includes the lesser power to permit interstate commerce in intoxicating liquors so far and under such conditions as Congress may determine."

It has been repeatedly held that, inasmuch as

a State could prohibit the traffic entirely, it could do less than that, if it so desired.

> "Ohio ex rel Dollison, 194 U. S. Rippey vs. Texas, 193 U. S. 504. "It is a question of the power of the State as a whole. Missouri vs. Dockery, 191 U. S. 165. But the State has power to prohibit the sale of intoxicating liquor altogether if it sees fit. Mugler vs. Kansas, 123 U. S. 623. That being so, it has power to prohibit it conditionally. It is true the greater does not always include the less, * * * but in general the rule holds good; it does here."

If the state, therefore, can do less than prohibit the entire traffic in liquor because it has power to prohibit it entirely, then when Congress has absolute power to prohibit the traffic in liquor through means of interstate commerce, it can do less than entirely prohibit such traffic. In other words, Congress has the same authority to prohibit the traffic through interstate commerce that the state has to prohibit the traffic within its borders. The power in each instance is complete and without limitation, and carries with it authority for doing less than is authorized.

THIS POWER TO PROHIBIT ARTICLES FROM INTERSTATE COMMERCE HAS BEEN ILLUSTRATED BY THE LAWS PROHIBITING THE SALE OF LIQUORS TO THE INDIANS, THE EMBARGO LAWS, ETC.

Congress has power to regulate commerce with foreign nations, among the several States, and with the Indian tribes. It would seemingly follow that the power to regulate commerce with the Indian tribes is exactly similar and equal to that conferred, to regulate commerce among the several States.

In United States v. 43 Gallons of Whisky, 93 U. S. 188, the Supreme Court states:

> "Congress, under its constitutional power to regulate commerce with the Indian tribes, may not only prohibit the unlicensed introduction and sale of spirituous liquors in the 'Indian country,' but may extend such prohibition to territory in proximity to that occupied by Indians."

It would seem to necessarily follow that if Congress under the Commerce Clause may not only forbid the importation of liquor into the Indian country, but also into adjoining and surrounding territory, it would have the power to prohibit the importation of liquors into the several States in violation of law.

In Buttfield's case, 192 U. S. 470, it is held Congress has plenary power to prohibit the importation of goods from foreign countries. To the same effect is the Gibbons case in the Northern Securities Litigation, 193 U. S. 334, where the Court said:

> "By the expressed words of the Constitution, Congress has power to regulate com-

> merce with foreign nations and among the several States and with the Indian tribes. In view of the numerous decisions of this court there ought not at this day to be any doubt as to the general scope of this power. Under some circumstances, regulation may properly take the form and have the effect of prohibition."

The acts of Congress were declared by the Supreme Court to be legitimate and constitutional under the authority to regulate commerce. The burden, therefore, would seem to be upon Congress and not the Court, to determine whether or not our national legislative body shall take the same attitude relative to the declared policies of the different States concerning the liquor traffic.

TRANSPORTATION OF ANIMALS.

By the Animal Husbandy, 23 Stat. 31, ch. 60, of May, 1884, Congress prohibited the transportation of live stock between the States which had or might have infectious and contagious diseases.

Reid v. Colorado, 189 U. S. 137, sustains the constitutionality of this act of Congress, and also sustains the constitutionality of a Colorado State statute, supplementing the Congressional act and providing far more stringent provisions. In fact, in this particular case the shipper had complied with the provisions of the Congressional act.

Justice Harlan said:

> "Now it is said the defendant has a right

> under the Constitution of the United States to ship live stock from one State into another. This will be conceded on all hands. But the defendant is not given by that instrument the right to introduce into a state, against its will, live stock affected by a contagious, infectious, or communicable disease, and whose presence in the State will or may be injurious to its domestic animals."

TRANSPORTATION OF FOOD AND DRUGS.

By the Pure Food and Drugs Act of 1906, Congress prohibited the shipment into any State of certain adulterated or misbranded foods and drugs.

In Hippolite Egg Co. v. United States, 220 U. S. 45, the Supreme Court of the United States sustained the constitutionality of this act.

TRANSPORTATION OF OBSCENE LITERATURE.

Congress prohibited the transportation of obscene literature, etc., and the constitutionality of the act was upheld.

U. S. v. Popper, 98 Fed. Rep. 423.

It is contended by some that these articles were not legitimate articles of commerce, but outlaws of commerce, subject already and at all times to the police powers of the States. It can hardly be contended that legitimate articles of commerce, improperly branded, were subject to the police powers of the States. They only become outlaws of commerce, and contraband, by the action of Congress,

and we are willing to accept the conclusion that thereby they are placed in control of the police power of the several States. Only by act of Congress was the Prohibition against transportation rendered effective.

CONGRESS HAS POWER TO ENACT THE LAW IN QUESTION AS A POLICE REGULATION.

Congress has authority to enact certain legislation having the quality of police regulations. The States have such power beyond the peradventure of a doubt. Congress has such power in certain instances and especially in the enactment of interstate commerce law, because the states delegated police power to Congress to act on this subject.

In the Rahrer case, 140 U. S. 545, it was said in sustaining the Wilson act that that act was:

> "Enacted in the exercise of its police powers and is constitutional and valid."

The lottery case above referred to holds that the Wilson act was sustained in the Rahrer case:

> "As a valid exercise of the power of Congress to regulate commerce among the States."

In the Addyson case (175 U. S. 211) the power of Congress is affirmed to regulate interstate commerce to any substantial extent. In the lottery case the power to regulate is put to the essential test whether the legislation is for the purpose of

guarding the morals of the people of the nation or involves that purpose.

In Phalens case (8 How. 161, 168) it is observed "that the suppression of nuisances, injurious to public health or morality, is among the most important duties of government."

In the case of Hoke v. State, 227 U. S. 309:

Syllabus:

> "Congress may adopt not only the necessary, but the convenient means necessary to exercise its power over a subject completely within its power, and such means may have the quality of police regulation.
>
> "Congress is given power to regulate commerce with foreign nations and among the several States. The power is direct; there is no word of limitation in it, and its broad and universal scope has been so often declared as to make repetition unnecessary. And, besides, it has had so much illustration by cases that it would seem as if there could be no instance of its exercise that does not find an admitted example in some of them. Experience, however, is the other way, and in almost every instance of the exercise of the power differences are asserted from previous exercise of it and made a ground of attack. The present case is an example.
> * * *
>
> "Our dual form of government has its perplexities, State and nation have different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people, and the powers reserved to the States

and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions, and surely if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of foods and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and more insistently of girls."

THERE IS THE SAME REASON FOR SUSTAINING A LAW WHICH WILL ELIMINATE LIQUOR FROM INTERSTATE COMMERCE, OR PUT ANY RESTRICTIONS ON IT SHORT OF ELIMINATION, THAT THERE WAS FOR SUSTAINING THE LAW FORBIDDING INTERSTATE TRAFFIC IN LOTTERY TICKETS, ETC.

At the International Conference on Alcoholism in London in 1909 and to which the great nations sent well-known and recognized scientific men, these representative medical leaders of the Conference drew up a report in the form of a statement defining the nature of alcohol as follows:

"Exact laboratory, clinical and pathological research has demonstrated that alcohol is a dehydrating protoplasmic poison, and its use as a beverage is destructive and

degenerating to the human organism. Its effect upon the cells and tissues of the body are depressive, narcotic and anaesthetic. Therefore, therapeutically its use should be limited and restricted in the same way as the use of other poisonous drugs."

Eminent medical authorities and leading medical journals agree that alcohol is a poison, that it has a detrimental effect on children and adults, when taken even in moderation, and that its use as a medicine is constantly decreasing because of its dangerous and evil tendencies.

"Alcohol is a poison, so is strychnine, so is arsenic, so is opium. Alcohol ranks with these agencies. Health is always in some way or other injured by it."—Sir Andrew Clark, M. D., Physician to late Queen Victoria.

"It is quite impossible to state that any given minimum amount of alcohol is harmless to our tissues. A man who desires to use his entire force on behalf of himself or his fellowman can do so best and longest by entirely avoiding alcohol."—Dr. Horsley in "Alcohol and the Human Body."

"We have this great physiological fact before us that the first thing alcohol does in 99 cases out of 100 is to affect the mental working of the brain of the man who imbibes."—Dr. Clouston.

"During the years 1861 to 1865 there entered the asylums of France 14,983 insane persons. In the same space of time, twenty

years later, there entered more than 57,000. Dr. Serrieux made researches and found that of the relapsed cases, 78 per cent were drunkards."—The Lancet.

"The latest and most authentic statistics show that over 10 per cent of all mentality is due to the abuses of alcohol and fully 20 per cent of all diseases is traceable to this cause. Also that over 50 per cent of insanity, idiocity and pauperism springs from this source. All authorities agree that from 75 per cent to 90 per cent of all criminality is caused by the use of alcohol."—Dr. T. D. Crothers, Superintendent, Walnut Lodge Hospital, Hartford, Connecticut.

"Alcoholism is chronic poisoning resulting from the habitual use of alcohol even when it is not taken in amounts sufficient to produce drunkenness. Alcohol is useful to nobody. It is harmful to all."—Professor Debove, Dean of the Faculty of Medicine, Paris.

"Among Bavarians, the greatest beer drinking people of the world, 300 of every 1,000 babies are born dead, and 69,000 die the first year of life."—Professor Hahnel, in "Journal of the German Abstaining Teachers' Society."

"Alcohol is not a food in the proper conception of the word. It is a sedative."—Sir James Barr, M. D.

"It is only lately we have begun to regard alcohol in the true light as a drug and not as a food."—Sir Spencer Wells, M. D.

INSURANCE FACTS.

Forty-three life insurance companies have been at work for the last five years collecting data on the effect of alcoholic beverages as disclosed by a scientific investigation of two million insured lives covering the period from 1885 down to 1909, as disclosed by the records of these forty-three companies. Arthur Hunter, chairman of the Central Bureau Medico-Actuarial Mortality Investigation, last December (1914) reported that the statistics gathered from these two million lives showed that among the men whose habits were considered satisfactory, but were admitted to be alcoholic users in moderate amounts, the death rate was fifteen to the thousand, where the death rate would have been only ten had alcoholic liquors not been used. He also stated that the data gathered from these two million lives showed that men whose average age was 35 years, would, as total abstainers, have had an expectancy of life for thirty-two years or more, but that the liquor drinking habit had caused a reduction of more than four years. Hunter also stated that if the government of Russia carries out its present intention of abolishing permanently all forms of alcoholic beverage, the saving in human life will be enormous. He illustrated by saying, should the Russians lose 500,000 men in the present war, this half million men would be made good in the population of Russia in less than ten years by total abstinence from alcoholic beverages. In

other words, the life of its people would be so extended that 50,000 lives would be saved each year from death by alcohol, and in ten years the people will have regained the 500,000 lost in war.

M. Bark, Minister of Finance in Russia, cognizant of these and similar facts from his own country, recently said:

> "When we sold vodka the people were poor. They stimulated themselves with an artificial strength to work for a few kopecks, with which they bought more of the fuel for renewing the artificial strength. The fuel, of course, was vodka. Though the money for the drink went into the treasury, the human machine which made that money became weaker and weaker. So the nation was really cutting off its revenue at the source."

This kind of authority could be cited from every civilized nation.

We submit the Supreme Court of Iowa was right when it said that the use of intoxicating liquor as a beverage is the cause of more want, pauperism and crime than all other causes combined. The individual might buy a lottery ticket and still have possession of his faculties and be able to work and not be liable to accident, as the man who drinks. He might buy lottery tickets and his body be able to ward off disease germs, but the man who uses intoxicating liquor is more subject to disease, has less recuperative power, and the records of our hospitals show that alcohol

affects injuriously every cell of the human body with which it comes in contact. It is a seductive poison.

There were places in the United States where the people wanted to continue the lottery business when this Court rendered its decision in the lottery case. In the elimination of the evils of lotteries, this Court held that interstate commerce is a means for protecting an evil which many of the States desired to eliminate. The Court said:

> "In legislation upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which for the protection of public morals prohibited the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It is said in effect THAT IT WOULD NOT PERMIT THE DECLARED POLICY OF THE STATES WHICH SOUGHT TO PROTECT THEIR PEOPLE AGAINST THE MISCHIEFS OF THE LOTTERY BUSINESS TO BE OVERTHROWN OR DISREGARDED BY THE AGENCY OF INTERSTATE COMMERCE."

The same reasoning which guided the Court in this decision can with greater force be applied to the case at bar. The people of the States in their struggle to advance civilization and eliminate this great evil, have driven the liquor traffic from the

smaller units of government and then from the States themselves.

Every time the people move forward in their attempt to better their conditions, the liquor interests have tried to devise some new scheme to evade the law. Their last refuge is the interstate commerce provision of the Constitution. Certainly there must be power somewhere in the State or in the federal government to deal effectively with a recognized evil such as intoxicating liquor. The State has gone as far as it can. Congress, under its power to regulate commerce, has declared that the shipment of liquor from one State to another, to be received, possessed, or used in violation of law, is prohibited. It is true Congress might have eliminated intoxicating liquor entirely from the articles subject to interstate commerce. They deemed it wise, however, to only prohibit intoxicating liquor which was shipped into a State in violation of its laws. Surely the State is entitled to this much protection by the federal government.

It was granted to the States in the case of lotteries, which did not cause but a fraction as much of crime and misery and poverty as the liquor traffic produces. At least the same consideration should be given the States in combating the evils of the liquor traffic as was granted to them in suppressing the evil of lotteries.

BECAUSE OF THIS INHERENT DELETERIOUS EFFECT OF ALCOHOL UPON THE

INDIVIDUAL WHO USES IT, THE COURTS HAVE UNIVERSALLY HELD THAT THIS TRAFFIC CANNOT INVOKE THOSE CONSTITUTIONAL GUARANTEES WHICH PROTECT OTHER PERSONAL AND PROPERTY RIGHTS.

Decision without number and from practically every jurisdiction in this country could be cited to support the general principles we contend for herein. We set out a few of the most important, coming particularly within the police power; that there is no right to engage in the traffic which is protected by constitutional limitations; that it cannot claim the inviolability of property or the equal protection of the law in the same sense that personal, political and property rights generally invoke it, and finally that there is no limit to the measures that may be devised to mitigate this evil or destroy it altogether, so long as such measures are designed to accomplish that purpose only and treat all alike who are alike engaged in the unwholesome traffic.

In Goddard vs. The Town of Jacksonville, 15 Ill., 589, the Court says:

> "It is not sufficient to say that liquors are property, and their sale as such is secure as that of any other property. Their sale for use as a common beverage and tippling, is hurtful and injurious to the public morals, good order and well-being of society. Playing cards and other gaming in-

struments, and obscene books and pictures, are likewise property; and the same right of sale might as justly be claimed; yet no complaint is made that even the importation as well as the sale is forbidden. When we defend the sale of liquors, for the purpose of tippling, we surely draw our arguments from our appetites, and not our reason, observation and experience. We may carefully protect the public morals and the profligate, from the evils of gaming, horse racing, cock-fighting; from obscenity of prints and pictures; from horses and exhibitions of mountebanks and rope-dancers; from the offensive smell of useful trades and hog-pens; from the manufacture and exhibition of fireworks and squibs; from rogues and idlers, vagabonds and vagrants; and from the dangers of pestilence, contagion and gunpowder—yet, according to the doctrine contended for, this right to vend a slow and sure poison as a common beverage, must remain intact, and not amenable to police regulations for its suppression, although all the other evils together will not destroy a tithe of the number of human lives, or produce more moral degradation, or suffering, wretchedness and misery in the social relations of society."

In Our House No. 2 vs. The State, 4 Freem. (Iowa), 172, the Court says:

"The statute is intended as a great public benefit. It seeks to abolish a general and growing evil, which is having a most

degrading effect upon the moral and physical condition of our race. It seeks to keep men from the common use of those intoxicating and poisonous beverages which so frequently lead to the ruin of property, character and health, and are proved to be the leading incentives to crime. It seeks to promote the general welfare, by prohibiting an excessive vice which is doing more to disqualify men for self-government than all other influences combined."

In Boebe vs. State, 6 Ind., 542, the Court says:

"That drunkenness is an evil both to the individual and to the State, will probably be admitted. That its legitimate consequences are disease and destruction to the mind and body will also be granted. That it produces from four-fifths to nine-tenths of all the crime committed, is the united testimony of those judges, prison keepers, sheriffs and others engaged in the administration of the criminal law, who have investigated the subject."

In State ex rel vs. Crawford, 42 American Reports, 186, the Supreme Court of Kansas says:

"Perhaps no greater source of crime and sorrow has ever existed than social drinking saloons. Social drinking is the evil of evils. It has probably caused more drunkenness and has made more drunkards than all the other sources combined, and drunkenness is a pernicious source of all kinds of crime and sorrow. It is a Pandora's box,

> sending forth innumerable ills and woes, shame and disgrace, indigence, poverty and want; social happiness destroyed; domestic broils and bickerings engendered, social ties surrendered; homes made desolate; families scattered; heart-rending partings; sin, crime, untold sorrows; not even hope left, but everything lost, and everlasting farewell to all true happiness and to all the nobler aspirations rightfully belonging to every true and virtuous human being."

In Thurlow vs. Commonwealth of Mass., 5 Howard, 504, the Court says:

> "It is not necessary for the sake of justifying the State legislation now under consideration, to array the appalling statistics of misery, pauperism and crime which have their origin in the use and abuse of ardent spirits."

In State vs. Kansas, 80 Pacific, 987, at page 989, the Court says:

> "The commodity in controversy is intoxicating liquors. * * * But the article is one whose moderate use, even, is taken into account by actuaries of the insurance companies, and which bars employment in classes of service involving prudent and careful conduct, an article conceded to be fraught with such contagious peril to society that it occupies a different status before the Courts and the legislature from other kinds of business."

In Crowley vs. Christensen, 137 U. S., 86, the Court says:

> "It is still the prolific source of disease, misery, pauperism, vice and crime. Its power to weaken, corrupt, debauch and slay human character and human life is not destroyed or impaired because it may be susceptible of some innocent uses, or may be used with propriety on some occasions. The health, morals, peace and safety of the community at large are still threatened, and under the form of government established for this State, and for the Union of States of which it is a member, these are special subjects of local legislative cognizance."

In Santo et al. vs. State, 2 Iowa, 165-190, the Court says:

> "There is no statistical or economical proposition better established, nor one to which a more general assent is given by reading and intelligent minds, than this: 'That the use of intoxicating liquors as a drink is a cause of more want, pauperism, suffering, crime, and public expense, than any other cause, and perhaps this could be said, than all other causes combined."

The traffic in question has been characterized by the Courts of last resort in the States and in the United States as "A source of crime and misery to society."

Justice Grier in the license cases 5th How., 504, said when referring to the loss of revenue resulting from the elimination of the traffic, "She (the government) would be the gainer a thousandfold in the health, wealth and happiness of her people."

We have said that the analogy between the liquor traffic and the lottery business is striking. The reason for prohibiting both is the same; to-wit: The business is injurious to public morals and the welfare of the people. A few more of the States had prohibited the sale of lottery tickets within their limits when the lottery case was decided than have thus far prohibited the liquor traffic. This does not go to the heart of the question at issue, but even if it did it is well to keep in mind how much of the territory in the United States is entitled to the protection proposed.

A LARGE PER CENT OF THE TERRITORY OF THE UNITED STATES IS UNDER PROHIBITION, AND NEEDS THIS LAW.

The absolute prohibition of the sale of intoxicating liquors for beverage purposes has been adopted by eighteen States (Maine, Kansas, North Dakota, Georgia, North Carolina, Oklahoma, Mississippi, Tennessee, West Virginia, Virginia, Colorado, Washington, Oregon, Arizona, Iowa, Idaho, Alabama and Arkansas).

The legislatures of twenty-four other States (California, Connectiuct, Delaware, Florida, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New York, Ohio, Rhode Island, South Carolina, Texas, Utah, Vermont and Wisconsin) have by law prohibited the sale of intoxicating liquors in certain classes

of political subdivisions, prohibition becoming operative whenever a majority of the electors in a regular or special election indicate by vote that they wish the provisions of the law to apply.

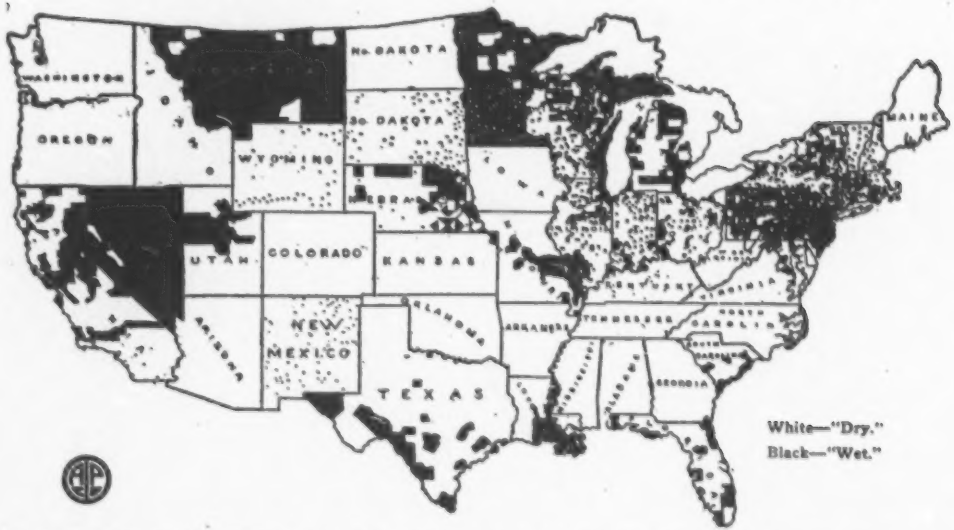
In still other States the legislatures have arbitrarily placed certain areas under prohibition legislation, thus adding to the aggregate population in prohibition territory. Since September of 1914, nine States have adopted prohibition. The steady growth of territory which seeks protection from a law like the one in question is shown by the following facts:

Four States dry in 1907;
Five States dry in 1908;
Nine States dry in 1909;
Ten States dry in 1914;
Eighteen States dry in 1915.

Approximately 80 per cent of the territory of the United States has abolished the beverage liquor traffic, and about 56 per cent of the population live in that territory.

With the majority of the people of the States living in dry territory, and an increase of those who live in dry territory amounting to 1,500,000 on the average every year for 20 years, it seems incredible that any Court would render a decision against the law, on the ground that not enough of the territory of the States had yet eliminated the traffic to justify such legislation.

"WET" AND "DRY" TERRITORIAL MAP OF THE UNITED STATES, APRIL 1, 1915



Note.—This map shows as "dry" those states also which have adopted Prohibition but where the law has not yet gone into effect.

THE WEBB-KENYON LAW IS NOT A DELEGATION OF LEGISLATIVE POWER.

It is claimed that the Webb-Kenyon law is a delegation of legislative power. It is the theory of those who oppose this law that Congress has delegated some power to the State to act in the passage of the interstate commerce provision, or law. Under the plenary power of Congress to regulate interstate commerce, this law provides that the protection of interstate commerce shall be denied to intoxicating liquors which are shipped from one State to another, when such liquors are to be received or possessed or used in violation of law. This is not a delegation of power, it is an absolute exercise of the power of Congress. It does not prohibit all liquors from the channels of interstate commerce, but simply those which are transported, received, possessed or used in violation of the law of the State.

If it be conceded that all liquors may be denied the privileges of interstate commerce, then it follows that the shipments of liquor in violation of law may be denied the privilege of interstate commerce. The Supreme Court of Iowa in the case of State vs. United States Express Company, 145 N. W. Rep. 451, has rendered a very able and conclusive opinion on this point:

> "The first and only serious contention as we view it, is whether or not the Webb-Kenyon Act is complete in itself, or is it

simply a delegation of power to the State to act for Congress in the matter. If the latter, then the act cannot be sustained. It will be observed at the outset that save for the want of a penalty of sanction in the act itself, as already pointed out, the act is complete in itself; and that according to many decisions which might be cited, it is uniform in its operation; that is, that it applies alike to all similarly situated, and, of necessity, to all who may, in the future, come within its provisions. There can be no doubt that the Congress, in virtue of its power over interstate commerce, might, in its discretion, put its ban upon all transportation of liquors in interstate shipment just as it has done with lottery tickets, the shipment of liquors to Indians, the method of shipment of liquor by express companies; the shipment of game; the carriage of infected live stock; the white slave traffic, etc. All of these and other like acts were passed to aid States which came within these provisions in the enforcement of local option laws which they deemed of vital importance to their citizens; in other words, to aid them in the enforcement of their police regulations. The act simply removes the bar theretofore existing to the enforcement of police regulations because of the interstate character of the transaction, and if it be within the power of Congress to forbid the shipment of all liquors in interstate traffic, no logical reason is

perceived why it may not do less, and forbid the shipment under certain conditions.

"There are no words of delegation in the act itself, and the theory of it is that liquors intended for use, contrary to State rules, should be an outlaw of interstate commerce, and neither the shipper nor the carrier may say that the State is interfering with interstate commerce, for the reason that right of such shipments between the States is denied by Federal legislation. It is true that the effect of the act is to give the States more power, but there is no such express delegation and the language of the act is in no sense permissive. The act is prohibitory in character and acts not upon States, but upon articles of commerce. Interstate commerce in these things is prohibited under certain conditions and, as we shall presently see, the act is uniform in its operation.

"The principles announced in State of Iowa vs. Forkner, 94 Iowa 1, are applicable here, particularly the discussion on page 9 to 17, inclusive. From the earliest history of the country, Congress has, in the exercise of its legitimate function, given force and effect to State laws. In the year 1803, and while Mr. Jefferson was President, Congress passed a law forbidding the transportation of free negroes from one State to another where they were not permitted by the laws of the State to reside. 2 State. Law 295, Act of Feb. 28, 1803.

"The white slave act forbids the trans-

portation of women for immoral purposes, and these immoral purposes may be defined by State laws. See Hoke vs. U. S., 308, 33 Rep. 281.

"The Lacey Act forbids the transportation in interstate commerce of game killed in violation of local laws. Crim. Code Act March 4, 1909, Sec. 242.

"Again, the judiciary act of 1789 expressly provided 'that the laws of the several States shall be rules of decision in trials at common law in the Courts of the United States, in cases where they apply.' 1 State Law 73.

"And this has always been regarded as a legitimate exercise of Federal power, and not a delegation of power. See Golden vs. Price, Fed. Cases, No. 5509.

"And nothing was found objectionable in this law because the States, or some of them, might, in the future, change their rules of practice. Other instances might be cited, but these are deemed sufficient. See, however, a discussion of the subject in a learned article by James D. Barnett, in Am. Political Science Review, p. 347.

"We may as well close this part of the discussion by quoting the following from In re Rahrer, supra:

* * * * * *

" 'This is not the case of a law enacted in the unauthorized exercise of a power exclusively confined to Congress, but of a law which it was competent for the State to pass, but which could not operate upon ar-

ticles occupying a certain situation until the passage of the act of Congress. That act in terms removed the obstacle and we perceive no adequate ground for adjudging that a re-enactment of the State law was required before it could have the effect upon imported which it had always had upon domestic property. Jurisdiction attached, not in virtue of the law of Congress, but because the effect of the latter was to place the property where jurisdiction could attach.'

"In Gibbons vs. Ogden, 9 Wheat 1, it appeared that Congress passed an act providing that:

" 'Until further provision is made by Congress, all pilots * * * shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be or with such laws as the States, respectively, may enact for the purpose.'

"Chief Justice Marshall, in speaking of the validity of this act, said:

" 'Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every state. The act * * * adopts this system and gives the same validity as if its provisions had been specifically made by Congress. But the act, if it may be said, is prospective also, and the adoption of laws to be made in the future, presupposes the right in the

maker to legislate on the subject. The act unquestionably manifests an intention to leave this subject entirely to the States, until Congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things, unless expressly applied to it by Congress. * * * The acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens may enable it to legislate on this subject to a considerable extent; and the adoption of its system by Congress, and the application of it to the whole subject of commerce, does not seem to the Court to imply a right in the States so as to apply it of their own authority. But the adoption of the State system being temporary * * * shows, conclusively, an opinion that Congress should control the whole subject, and might adopt the system of the State, or provide one of its own.' This act and acts recognizing the validity of State health laws, and certain other acts, he thinks, show an opinion of Congress 'that the States retain powers enabling them to pass the laws to which allusion has been made.'

"See all to the same effect:

"Cooley vs. Board of Wardens, 12 How. 299;

"The Panama Fed. Cases 10, 702;

"The Clymene, 9 Fed. 164;

"22 Pick (Mass.) 571;

"Van Allen vs. Assessors, 3 Wall 573;
"People vs. Weaver, 100 U. S. 539;
"Farmer's Bank vs. Dearing, 91 U. S. 29, 23 L. Ed. 196;
"Ex Parte Jervey 66 Fed. 957;
"Bowan vs. R. R. 125 U. S. 465;
"Schollenberger vs. Penna. 171 U. S. 1;
"Blair vs. Ostrander 109 Iowa 204;
"Central Pac. R. R. Nevada 162 U S. 512;
"Hanover Bank vs. Moyses, 186 U. S. 181;
"Morgan vs. Board of Health, 6 Sup. St. Rep. 1114.

"Apt quotations might be made from each and all of these cases, which hold that such an act as the one before us is either permissive in its nature or an adoption of the laws of the State, and that in either event there is no delegation of power to the States. It will be noticed, too, in reading these cases, that the objection that there might be as many rules as there were different States, met with no favor, and was either held to be without merit or entirely disregarded.

"We may as well quote in closing this part of the discussion, from the remarks of Senator Hoar, in discussing the Wilson act, when it was before the Senate of the Unit- States, as follows:

" 'Congress may say the power to engage in interstate or international com-

merce shall not be understood as permitting anybody to sell opium or intoxicating liquors to anyone else, and that they shall be excluded altogether from the domain of interstate commerce. That Congress has a right to say. * * * That is not a question of delegated power. It is not a question of permission to the State. It is a question of the right of Congress to prescribe what shall be the limit of interstate commerce.'

"This is a very clear statement of the rule and to our mind leaves nothing to the argument, that the act in question is a delegation of power to the State."

LEGISLATIVE POWER MAY PROHIBIT ACTS INNOCENT IN THEMSELVES IF SUCH LAWMAKING BODY THINKS THAT THE ADMITTED EVIL CANNOT BE PREVENTED EXCEPT BY THE ENACTMENT OF SUCH A LAW.

It is well settled in law that when authority is given the Legislature or Congress to pass a law, it carries with it also authority to pass any additional legislation to make the law enforceable. This proposition is also re-enforced with reference to the legislation now under consideration by the United States itself. Clause 18, section 8, article one, specifically gives to Congress power to make all laws which shall be necessary and proper for carrying into execution the power given in passing interstate commerce laws. Authority is given

Congress to pass a law controlling interstate commerce, and this carries with it the power to eliminate from interstate commerce any article which Congress deems to be detrimental to public morals or public health.

There are many authorities for the proposition that laws may be passed by the legislature or by Congress to make effective existing legislation. One of the familiar lines of authorities is that which prohibits non-intoxicating liquors to be sold when the only authority given in the constitution is to regulate or prohibit intoxicating liquors. The Court upholds the law on the ground it is necessary to include innocent acts often in order to prevent the evil admitted. No one will deny that the States have full power to prohibit the manufacture and sale of intoxicating liquors. No authority is given for the State to prohibit non-intoxicating liquors. The Courts, however, have upheld such legislation because it was necessary to enforce law. The same principle is involved in national legislation in dealing with the liquor traffic.

In the case of United States vs. Cohn—Court of Appeals of Indian Territory, 32 S. W. Rep. 38, the Court had before it the duty of interpreting the Federal statute which forbade the sale within the territory of a non-intoxicating liquor known as Rochester tonic. The opinion at length discussed the right of the States in the exercise of

their police power to prohibit the sale of such beverage and decides that whatever the States may do in that behalf, Congress may do for the territories. After quoting the statute at length, the Court said:

> "No one can carefully read this statute but that he will be impressed with the idea that Congress, whatever it omitted to do, intended to completely cover the whole case, and to erect and complete an impregnable barrier against the introduction, sale and use of intoxicating liquor in all of its forms and to guard against all of the well-known subterfuges resorted to to deceive Courts and juries in relation to the matter. * * * Congress evidently had some purpose in thus changing the ordinary and common use of language."

In State vs. Frederickson, 101 Me. p. 37, the Court reaffirms this proposition as follows:

> "The liquors above enumerated are declared intoxicating by law. In determining whether or not a liquor is to be regarded as intoxicating under this enumeration, it is entirely immaterial whether it is intoxicating in fact. As was well said in State vs. 'Connell,' 99 Me. 61: 'It is not for the jury to revise the judgment of the legislature and determine whether a liquor is or is not intoxicating.' When it appears that a liquor comes within the scope of the forbidden enumeration, that moment its intoxicating character becomes fixed by law, and

> its non-intoxicating character, as a matter of fact, becomes entirely immaterial with respect to the application of the statute. Commonwealth vs. Blos, 116 Mass., 36; Com. vs. Athens, 12 Gray, 29; Com. vs. Brelsford, 161 Mass., 61; State vs. Piche, 98 Maine, 348; State vs. O'Connell, 99 Maine, 61; Com. vs. Show, 133 Mass., 575; State vs. Intoxicating Liquors, 76 Iowa, 243; State vs. Guiness, 16 R. I., 401."

And proceeding to consider defendant's proposition that the law was in contravention to the Fourteenth Amendment to the Federal Constitution, the Court says:

> "Here two questions must be considered: First, whether this provision of the Federal Constitution is violated by a State law regulating or prohibiting the sale of intoxicating liquors, and second, whether it is violated by a State law declaring certain liquors intoxicating within the meaning of the law governing intoxicating liquors, irrespective of the intoxicating character of such liquors as a fact. The answer to both of these questions is that a State law regulating or prohibiting the selling or keeping for sale of intoxicating liquors is a legal exercise of police power and is not in contravention of the Fourteenth Amendment to the Federal Constitution."

In the case of Feibelman vs. State, 130 Ala., 122, approved by the recent case of Dinkins vs. State, Ala. 43 Southern 114, the defendant was

convicted under a statute which made it an offense to sell spirituous, vinous or malt liquors, or intoxicating liquors or beverages, within three miles of a certain church. The proof showed that the article sold was a non-intoxicating malt liquor called "Hop Jack." The Supreme Court of Alabama, reviewing the overruling, by the trial Court, of the motion to exclude the evidence, said:

> "We may, for all the purposes of this case, concede without indicating any opinion upon the question, that the legislature may not, in the exercise of police power, prohibit the sale of malt liquor which is not intoxicating nor otherwise deleterious in any way, where the sole purpose and object is the prevention of the sale of that particular character or quality of malt liquor. But it is common knowledge that most malt liquors are intoxicating and harmful when used excessively and are capable of excessive use as a beverage. The sale of all such, of course, the legislature has the power to prohibit. But, if the prohibition should go only to the sale of intoxicating malt liquors, there would be left open such opportunities for evasions and there would arise such difficulties of proof as the law could not be effectively executed; and the law-makers having the undoubted power to prohibit and prevent the sale of intoxicating malt liquors, and to enact to that end a law which can be executed so as to secure it, and finding that this cannot be accomplished without extending the prohibition to all malt liquors,

whether intoxicating or not, such extension, necessary to prevent the sale of intoxicants, is as essentially the proper exercise of the police power as the inhibition with reference to intoxicants."

In the case of Pennell vs. State, 123 N. W. Rep., we find the following:

"If the State thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it is a clear, unmistakable infringement of rights secured by fundamental law."

In the case of State vs. Walder, 83 O. St. 68 at page 84, the Court said:

"The legislature may have heard of 'Bishop's Beer,' 'Friedon Beer' and later of 'Near Beer' and concluded that the enforcement of the will of the majority should not be defeated by subterfuge, or the juggling in percentages of alcohol, and has said that for the purpose of carrying out the intention of the people to prohibit the sale of intoxicating liquors, certain beverages shall be legally considered intoxicating, although not so in fact, and malt liquor is one of those so designated."

The States have power to prohibit the sale of liquor and enact legislation to accomplish that end. The States have delegated to Congress the

power to control interstate commerce in liquors. Congress has power, therefore, to make legislation effective to accomplish that end. It was never intended that the Federal government should be used as a means to thwart the enforcement of law in the States, or to protect a traffic which has been characterized by the Supreme Court as a "Source of crime and misery to society." Under the authority to regulate interstate commerce, Congress has as much power to pass a law like the one in question as a State has to pass a law prohibiting a mere innocent act because it is necessary to make law enforcement possible.

DECISIONS OF STATE SUPREME COURTS AND U. S. CIRCUIT COURT OF APPEALS HAVE UNIFORMLY SUSTAINED THE CONSTITUTIONALITY OF THE WEBB-KENYON LAW.

Since the enactment of the Webb-Kenyon law a large number of cases have been started to test its constitutionality.

A very limited number of the lower courts have called into the question the constitutionality of the act. All of the other Courts sustained it. Every State Supreme Court and United States Circuit Court of Appeals passing upon it, have sustained it. In some of the states the issue was not clearly joined as to whether the state could enact a law making the place of delivery the place of sale.

The state, where this issue was clearly met and finally decided by the United States Circuit Court of Appeals in the case of West Virginia vs. Adams, supra, upheld the constitutionality of both the State and Federal law. The constitutionality of the law has been sustained in the following cases:

> State of West Virginia vs. Adams Express Co. Fed. Rep. No. 4, Vol. 219, April 1, 1915, page 794; American Express Co. vs. Beer (Miss.) 65 So. 115; Ex Parte Peede (Tex.) 170, S. W. 749; Van Winkle vs. State, (Del.) 91 Atl. 385; State vs. Oregon R. & N. Co. 210 Fed. 378; State vs. Express Co. (Ind.) 145, N. W. 451; State vs. Doe (Kas.) 139 Pac. 1169; Palmer vs. Express Co. (Tenn.) 165 S. W. 236.

The case which meets most squarely and conclusively the questions raised in this hearing is West Virginia vs. Adams Express Company, Fed. Rep. Vol. 219, No. 4, April 1, 1915, p. 785. While the conclusions of that Court are not binding upon this Court, the logic of their opinion is sound and the argument is unanswerable.

> "In trying to comprehend the legislative purpose in prohibition statutes it is important to remember that the ultimate end sought in prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, but the prevention of their consumption as a beverage. The sale being the most usual and obvious means by

which drinking is accomplished, legislation is more often directed against the sale. But it is upon the recognized evil of individual consumption as a beverage that the right of a State under its police power rests to enact prohibitive legislation; and in the exercise of that right it cannot be denied that the State may legislate not only against acts which would constitute a sale at common law, but against other acts within its borders, such as deliveries by common carriers, which tend to defeat or weaken its public policy of preventing the consumption of liquor as a beverage.

"We are not concerned in this case with the question whether the State Legislature or the State Legislature and the Congress in conjunction can forbid a citizen to drink intoxicating liquors or purchase them in another State and bring them into the State of West Virginia for his own consumption; but with the very different question whether the State may forbid the sale of liquor in its borders and make the delivery by a carrier a sale at the place of delivery; and whether the Congress can prohibit the transportation in the State by the common carrier of liquor so to be delivered contrary to the law of the State. We think it can be demonstrated that this question must be answered in the affirmative—that it can be made perfectly manifest that shipments into the State and deliveries by common carriers, by which liquor dealers outside of prohibition States were enabled to thwart

the efforts of State governments to save the people of the State from the liquor evil, have been forbidden by State Legislation made valid by the withdrawal of the protection of interstate commerce from such shipments under the Act of Congress known as the Webb-Kenyon Act.

* * * * * *

"At the argument it seemed to be conceded that State legislation would be effective to make the place of delivery the place of sale, with respect to transactions within the scope of the State legislative power. The power of the State to enact laws regulating and controlling commercial transactions within its own limits, subject only to the condition that the regulations shall not arbitrarily impair property rights or interfere with interstate commerce, has been affirmed in Sinnot vs. Davenport, 63 U. S. 227. Delameter vs. South Dakota, 205 U. S. 93, and innumerable other federal and State decisions. "The internal commerce of a State—that is, the commerce that is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the federal government." Sands vs. Manistee River Improvement Company, 123 U. S. 288; Hart vs. State, 87 Miss. 171, 39 So. 523, 112 Am. St. 437. This power includes the regulation of sales and the change of the general rule of the common law, that delivery to the carrier is a completion of the sale, into a general statutory rule as to every sale that it

shall not be complete until delivery to the consignee, or into a special statutory rule that the sale of intoxicating liquors shall not be complete until delivery to the consignee, and that the place of delivery shall be the place of sale. The validity of such a special statutory regulation is illustrated in State vs. Herring, 145 N. C., 418 58 S. E. 1007, 122 Amer. St. 461, and State vs. Patterson, 134 N. C. 612, 47 S. E. 808. * * *

"The express company further contends that the State is not entitled to an injunction against the delivery in West Virginia of the liquor which it has transported for Biegel, or against its intended transportation and delivery of liquor which Biegel intends to consign to other persons in West Virginia, on the assertion that these transactions are under Federal protection as interstate commerce and beyond the reach of the Legislature of the State. This proposition is admitted to be sound, unless the Webb-Kenyon Act removes the protection, and subjects the delivery of liquor in West Virginia to the inhibition of the State Legislature, although the contract of sale be made in Ohio for the shipment of liquor to West Virginia.

"The position is untenable that the Webb-Kenyon Act has no application, and therefore is without efficacy to extend the scope of the State legislation to interstate dealings in liquor because that statute was not enacted until March 1, 1913, after the West Virginia statute had been passed on

11 February, 1913. The point has not been decided by the Supreme Court of West Virginia. There is a dictum in State vs. Miller, 66 West Virginia 436, in favor of the position of the express company, where the question was the application of the Wilson Act to West Virginia legislation. But as the court expressly stated the point was not and could not be involved since the State statute under consideration had been re-enacted after the passage of the Wilson Act. But even if this had been a direct decision we do not think it could prevail against the contrary view of the Supreme Court of the United States, for we venture to think the question is not one of the construction of a State statute, but of the force and effect of a Federal statute in a State law and on such an issue the decisions of the Supreme Court of the United States are controlling. That court thus determined the matter in In Re Rahrer, 140 U. S. 545; in passing on the effect of the Wilson Bill:

" 'Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction.'

"This principle has been reaffirmed in

Butler vs. Gorley, 146 U. S. 303, Ernest vs. Missouri, 156 U. S. 296; Central P. C. R. Co. vs. Nevada, 162 U. S. 512; Silt vs. Westerburg, 211 U. S. 31. * * *

"The terms of the statute are so plain and unambiguous that we are unable to perceive that its interpretation requires any resort to construction. The Wilson Bill withdrew the protection of interstate commerce from liquor and made it subject to the State law only after arrival and delivery to the consignee. But under that statute, after arrival and delivery to the consignee, 'imported liquor fell within the category of domestic articles of a similar nature.' In Re Rahrer, Supra.

"The Webb-Kenyon Act is the result of a growing public conviction that it was an abuse of interstate commerce that even under the Wilson Bill liquor dealers in one State were protected in impairing or defeating the efforts of another State to root out or to minimize the evil of the use of liquor as a beverage. This statute prohibits the shipment or transportation of liquor from one State into another not only when it is intended to be sold in violation of any law of such State, but when it is to be received or possessed or in any manner used in violation of the State law. This is a direct recognition of the right of the State to prohibit the receipt or delivery as well as the possession and use of liquor, without trespassing upon the power of Congress to regulate interstate commerce. The State of West

Virginia has enacted with reference to a contract for the sale of liquor that 'the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee,' and it expressly forbids a sale within the State. This makes the receipt or delivery have the effect of a sale and in forbidding the sale it forbids the receipt or delivery, which under the statute is the consummation of the sale. Thus it appears that the transportation and delivery already made in this case and the transportation and deliveries contemplated for the future fall within the express description of the transactions from which the Congress intended to withdraw the protection of interstate commerce. Any other construction would not only distort the language, but continue the obstacles to the enforcement of State prohibition laws which it was the manifest intention of the Congress to remove. The Supreme Court of Kentucky has held that although the State statute expressly prohibits the delivery of liquor by a common carrier and such prohibition is valid as to all intrastate shipments, yet the Webb-Kenyon Act does not permit such prohibition to extend to intrastate commerce where the liquor is for personal use. Adams Express Company vs. Commonwealth, 154 Ky. 426, 157 S. W. 908, 47 L. R. A. (N. S.) 342.

"All other decisions we think are in complete accord with the conclusion we have reached, namely that the Webb-Kenyon Act

puts without the protection of interstate commerce liquor shipped into the State to be sold, received, or used, when sale, receipt or use is forbidden by the State law. Palmer vs. Express Co., (Tenn.) 165 S. W. 236; State vs. Doe (Kansas), 139 Pac. 1169; State vs. Express Co. (Ind.), 145 N. W. 451; United States vs. Oregon-Washington R. & N. Co., 210 Fed. 378; Van Winkle vs. State (Del.), 91 Atl. 385; Ex Parte Peede, (Texas) 170 S. W. 749; Southern Express Company vs. State (Ala.), 66 So. 115; Amer. Express Co. vs Beer (Miss.), 65 So. 575. The general trend of Congressional debate on the bill attributed the same meaning to the act, as did also the opinion of the Attorney General given to the President on the question of its constitutionality. Since delivery by one party is necessary to the receipt by another, if receipt be forbidden by a statute, deliveries might well be enjoined as acts promoting illegal receiving of liquor. Under the West Virginia Statute they are the subject of injunction as sales within the State.

"The constitutionality of the Webb-Kenyon Statute is attacked on the ground that it is an attempt by Congress to confer on State Legislatures the power to regulate interstate commerce. This we think is a complete misapprehension. That the Congress has power to outlaw and exclude absolutely or conditionally from interstate commerce intoxicating liquors or any other deleterious substance has been very often

decided. Ex Parte Rahrer, Supra; Lottery Case, 188 U. S. 321; Hoke vs. U. S., 227 U. S. 308; Hipolite Egg Co. vs. United States, 220 U. S. 45. One distinction is between things deleterious and things beneficial or innocuous. The power to regulate is the power to make reasonable rules of admission or exclusion. The power to exclude intoxicants absolutely or conditionally does not import the power to exclude sound wheat.

"The following language of Mr. Justice White in Vance vs Vandercook, 170 U. S. 438, referring to the regulations of the South Carolina dispensary law, was cited here and has been cited elsewhere as giving countenance to the notion that the Congress has no right to legislate against the shipment or transportation of liquor intended for personal use from a license State to a prohibition State.

" 'On the face of these regulations, it is clear that they subject the constitutional right of the non-resident to ship into the State and of the resident in the State to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges. The right of a citizen of another State to avail himself of interstate commerce cannot be held to be subject to the issuing of a certificate by an officer of the State of South Carolina, without admitting the power of that officer to control the exercise of the right. But the right

arises from the Constitution of the United States; it exists wholly independent of the will of either the lawmaking or the executive power of the State; it takes its origin outside of the State of South Carolina and finds its support in the Constitution of the United States.'

"It is perfectly manifest that this language refers to the constitutional provision giving the Congress control of interstate commerce to the exclusion of the States, and not to the power of the Congress under the authority of the Constitution to exclude absolutely or conditionally deleterious substances.

"As to intoxicating liquors, though universally recognized as deleterious, the Congress has not seen fit to exclude them entirely from interstate commerce, but has made the exclusion on this condition, namely, that they shall not be transported by common carriers into particular States when such transportation would be especially injurious to the public interest in that, when they reach the State, they will derange and make inefficacious the police measures for the control of intoxicants which the State has seen fit to adopt. The Courts can hardly find room to doubt that this qualified exclusion made in aid of the efforts of a number of the States of the Union to combat one of the greatest evils of human life is founded on deep reason and enlightened public policy."

THE OPINION OF JUSTICE CLARK OF THE SUPREME COURT OF SOUTH CAROLINA IS CLEAR AND CONVINCING.

State vs. Cardwell, 81 S. E. Rep. p. 628 at page 632.

"The power of Congress to decide what are subjects of interstate commerce, like its power to exclude articles from importation into this country in foreign commerce, has never been challenged. Besides the instances above cited as to lottery tickets the Pure Food law (Act of June 30, 1906, c. 3915, 34 Stat. 768 U. S. Comp. St. Rupp, 1911, p. 1354.) the White Slave traffic, there are other instances among them. The Lacey Act adopted in March, 1904, (Act May 25, 1900, c. 553, 31 Stat. 187. U. S. Comp. St. 1901, p. 2901) which forbids the transportation in interstate commerce of game killed in violation of local laws. There are other instances and there are bills pending to exclude from interstate commerce articles made by convicts or by children under a certain age, and the like. Indeed in Penn. vs. Bridge Co. 59 U. S. (18 How), 421, 15 L. Ed. 435, where the United States Supreme Court had held in the former decisions that a certain bridge over a navigable stream was an obstruction to commerce, Congress at once enacted a statute that this particular bridge was not an obstruction to commerce, and the court held that Congress had the power to so declare. Three State Supreme Courts have already upheld the Webb-Ken-

yon law as expressed in this concurring opinion.

* * * * * *

"Indeed Congress has taken every successive step that has been found necessary to enable prohibition states to enforce their policies as to intoxicating liquors. For half a century up to 1888 the Courts recognized the jurisdiction of the states over interstate shipments of liquor from the time they entered the state to be the same as other domestic liquors. This was questioned for the first time in Bowman vs. Northwestern, 125, U. S. 500, 8 Sup. Ct. 689, 31 L. Ed. 700. (By a vote of 5 judges against 4) and in Leisy vs. Hardin, 135 U. S. 124, 10 Sup. Ct. 681, 34 L. Ed. 128 (three judges dissenting); and the court basing its decision on the ground that as Congress had enacted no law restricting or limiting interstate commerce, such commerce should be free and untrammeled.

"The Wilson Act was then passed to place liquors shipped into another state on arrival therein on the same footing in every respect and as fully subject to the laws as if produced therein. The court in Rhoades vs. Iowa, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088, have held that 'on arrival' meant delivery to the consignee; this deprived the states of jurisdiction up to that time. Thereupon the Webb-Kenyon law was enacted to remove that restriction. An act should always be construed according to its intent, and with a view to remedying the evil. Any

act that is not passed surreptitiously or by improper influence or inadvertence, must be taken as expressing the will of the electorate.

"In considering what is the evil to be remedied and the will of the constituents of Congress, it will be appropriate to consider the present status and extent of the state laws prohibiting the sale of intoxicating liquors. Absolute prohibition of the sale of intoxicating liquors as a beverage now prevails over three-fourths of the area of the United States and as to 50 millions or 55 per cent of its population. * * *

"As the United States Supreme Court well said as to lotteries (188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492.)

" 'It would not permit the declared policy of the states, which sought to protect their people against the mischiefs of the lotteries business, to be overthrown, or disregarded, by the agency of interstate commerce.'

"This applies with equal force to the prohibition of the sale of intoxicating liquors. It has not been the intention of Congress to permit its control of interstate commerce to impair the police power of the state, but, on the contrary, to use it as an aid to the states in enforcing their home rule regulations."

A number of other decisions might be quoted which clearly set forth the reasons why the Webb-Kenyon law is constitutional and the construction for which we contend is reasonable and sound.

We submit in conclusion:

First. We have clearly proven that the Webb-Kenyon law includes within its terms the Express Companies, because they are interested in the shipment of liquor complained of.

Second. The law of Kentucky, making the place of delivery the place of sale, both for intrastate and interstate shipments, is a valid exercise of legislative power.

Third. The Webb-Kenyon law is a constitutional enactment.

We believe it is in harmony with sound public policy for the national government to withdraw Federal protection from liquors shipped into States in violation of their State laws. The power to reach violations of law and recognized evils, such as the State is trying to eliminate by the legislation in question, must be lodged somewhere in government. It is unbelievable that a construction must be placed upon our Constitution which will harbor and protect this outlawed traffic.

The Courts as agencies of government have always hesitated to declare unconstitutional any law which encourages the people in their effort to carry out these fundamental purposes of government, as proposed by the statute in question.

For the above, and other reasons set forth in

the brief, we respectfully submit that the writ of error should be denied.

Respectfully submitted,

Joseph B. Snyder,
Commonwealth's Attorney 34th Judicial District Kentucky.

W. B Wheeler,
Attorney for Anti-Saloon League of America.

Amici Curiae.

ADAMS EXPRESS COMPANY *v.* COMMONWEALTH OF KENTUCKY.

ERROR TO THE CIRCUIT COURT OF WHITLEY COUNTY, STATE OF KENTUCKY.

No. 271. Argued May 10, 11, 1915.—Decided June 14, 1915.

The first resort, with a view to ascertaining the meaning of a statute, is to the language used; if that is plain there is an end to construction and the statute is to be taken to mean what it says.

The purpose of Congress in enacting the Webb-Kenyon Act of March 1, 1913, c. 90, 37 Stat. 69, was not to prohibit all interstate shipment or transportation of liquor into so-called dry territory, but to render the prohibitory provisions of the statute operative whenever, and only when, the liquor is to be dealt with in violation of the law of the State into which it is shipped.

Except as affected by the Wilson Act of 1890, which permits state laws to operate on interstate shipments of liquor after termination of transportation to the consignee and the Webb-Kenyon Act of 1913, which prohibits interstate transportation of liquor into a State to be dealt with therein in violation of the laws of that State, the interstate transportation of liquor is left untouched and remains within the sole jurisdiction of Congress under the Federal Constitution.

As it appears that an interstate shipment of liquor into Kentucky was not to be used in violation of the laws of that State as such laws have been construed by its highest court, the Webb-Kenyon Act had no effect to change the general rule that a State may not regulate commerce which is wholly interstate.

THE facts, which involve the construction and application of § 2569a of the statutes of Kentucky in regard to local option and of the Act of Congress known as the Webb-Kenyon Law, are stated in the opinion.

Mr. Joseph S. Graydon and *Mr. Lawrence Maxwell* for plaintiff in error:

A citizen of Kentucky has the constitutional right to possess and use intoxicating liquors.

The cases in the Court of Appeals of Kentucky upheld this right as well as the cases in other States.

The Webb-Kenyon Law does not authorize the application of a state statute to an interstate shipment for lawful, personal use.

The purpose of the law as shown by debates in Congress and the cases in the Court of Appeals of Kentucky and other courts also so hold.

There are conflicting opinions on the subject, involving the West Virginia law; on which appeals are pending in this court.

The cases involving imported liquors intended to be used in violation of law can be distinguished.

The Webb-Kenyon Law, as construed and applied by the lower court, would be unconstitutional.

In support of these contentions, see *Adams Exp. Co.* v. *Kentucky*, 214 U. S. 218; *Adams Exp. Co.* v. *Commonwealth*, 154 Kentucky, 462; *Adams Exp. Co.* v. *Commonwealth*, 160 Kentucky, 66; *Adams Exp. Co.* v. *Crigler*, 161 Kentucky, 89; *American Exp. Co.* v. *Beer*, 65 So. Rep. 575; *Anderson Net Co.* v. *Worthington*, 141 U. S. 468; *Atkinson* v. *Southern Exp. Co.*, 94 S. Car. 44; *Bristol Distributing Co.* v. *Southern Exp. Co.* (Sup. Ct. App. of Virginia, unreported); *Calhoun* v. *Commonwealth*, 154 Kentucky, 70; *Clark Distilling Co.* v. *American Exp. Co.*, 219 Fed. Rep. 339; *Clark Distilling Co.* v. *West. Maryland Ry.*, 219 Fed. Rep. 333; *Commonwealth* v. *Campbell*, 133 Kentucky, 50; *Commonwealth* v. *Smith*, 163 Kentucky, 227; *Delaware* v. *Grier*, 88 Atl. Rep. 579; *Downes* v. *Bidwell*, 182 U. S. 244; *Dunlap* v. *United States*, 173 U. S. 65; *Eidge* v. *Bessemer*, 164 Alabama, 599; *Hamm Brewing Co.* v. *Chicago, R. I. & P. Ry.*, 215 Fed. Rep. 672; *Holy Trinity Church* v. *United States*, 143 U. S. 457; *Iowa* v. *U. S. Exp. Co.*, 145 N. W. Rep. 451; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 19; *Kansas* v. *Doe*, 92 Kansas, 212; *Kirmeyer* v. *Kansas*, 236 U. S. 568; *Louis. & Nash. R. R.* v. *Cook Brewing Co.*, 223 U. S. 70; *Martin* v. *Commonwealth*, 153 Kentucky, 784; *North Carolina* v. *Cardwell*, 166 N. Car. 308; *North Carolina* v. *Williams*, 146 N. Car. 618; *Palmer* v. *Southern Exp. Co.*, 165 S. W. Rep. 236; *Ex parte Peede*, 170 S. W. Rep. 749; *In re Rahrer*, 140 U. S. 155; *Rhodes* v. *Iowa*, 170 U. S. 412; *Smith* v. *Southern Exp. Co.*, 82 S. E. Rep. 15; *Southern Exp. Co.* v. *Alabama*, 66 So. Rep. 115; *Southern Exp. Co.* v. *High Point*, 83 S. E. Rep. 254; *United States* v. *Oregon Navigation Co.*, 210 Fed. Rep. 378; *Vance* v. *Vandercook* (1), 170 U. S. 439; *VanWinkle* v. *State*, 91 Atl. Rep. 385; *West Virginia* v. *Adams Exp. Co.*, 219 Fed. Rep. 331 and 794. See also Committee on Judiciary hearings, January 11, 1912; Congressional Record, Feb. 8, 1913, p. 365; Freund on Police Power, § 453; Kentucky Criminal Code, § 347;

Kentucky Statutes, § 2569a; Webb-Kenyon Law, 37 Stat. 699.

Mr. James Garnett, Attorney General of the State of Kentucky, with whom *Mr. Robert T. Caldwell*, Assistant Attorney General of the State of Kentucky, was on the brief, for defendant in error.

Mr. W. B. Wheeler and *Mr. J. B. Snyder* filed a brief as *amicus curiæ* by permission of the court.

MR. JUSTICE DAY delivered the opinion of the court.

The Adams Express Company was indicted for violation of § 2569a of the statutes of the State of Kentucky, which, omitting the portions not essential to the consideration of this case, provides:

"It shall be unlawful for any . . . public or private carrier to bring into, . . . deliver or distribute, in any county, district, precinct, town or city, where the sale of intoxicating liquors has been prohibited, . . . any spirituous, vinous, malt or other intoxicating liquor, regardless of the name by which it may be called; and this act shall apply to all packages of such intoxicating liquors whether broken or unbroken. . . . Any . . . public or private carrier violating the provisions of this act shall be deemed guilty of violating the local option law and shall be fined not less than fifty nor more than one hundred dollars for each offense. . . . And the place of delivery of such liquors shall be held to be the place of sale; . . ."

The charge of the indictment was that the Adams Express Company, doing the business of a common carrier in Kentucky, did knowingly bring into and deliver in Whitley County of that State certain intoxicating liquors to one John Horshaw, contrary to law. This case, with

eighteen others, was heard in the Circuit Court of Whitley County, upon an agreed statement of facts, which stipulated that the Adams Express Company was engaged in the business of a common carrier and did such business in Whitley County, Kentucky, and between that county and the cities of Jellico and High Cliff, in the State of Tennessee. That on the dates named in the indictments the Adams Express Company knowingly brought into, transferred, delivered and distributed certain spirituous liquors, to wit: whiskey, in local option territory and where the local option law was in force, as charged in the indictment. That before bringing such liquors into such territory the consignees of said liquors, being the persons named in the indictment, sent orders by mail for such liquors to dealers at Jellico and High Cliff, in the State of Tennessee, and paid the purchase price of said liquors to said dealers at the places named in Tennessee. That upon receipt of the orders, the dealers, at their respective places of business at Jellico and High Cliff, Tennessee, for the purpose of filling such orders delivered to Adams Express the several packages of liquor, directing the Express Company to carry and deliver the same to such persons; that the Adams Express Company did thereupon carry said packages of liquor from Jellico and High Cliff, in Tennessee, into Whitley County, Kentucky, and there delivered the same to the consignees thereof, who were the persons who had made the orders and to whom the indictments charged the defendant with delivering and distributing the liquors mentioned. That the liquors were intended by said consignees for their personal use and were so used by them, and were not intended by them to be sold contrary to law, and were not so sold by them. That the transactions and all of them described occurred since the enactment and going into effect of the Act of Congress known as the Webb-Kenyon Law.

The Express Company requested a peremptory instruc-

tion for a verdict of not guilty because the shipments of liquor were interstate shipments and constituted interstate commerce within the meaning of the commerce clause of the Federal Constitution. That the liquors being for the personal use of the consignees respectively § 2659a is repugnant to the constitution of Kentucky, and if the indictment was authorized by the Act of Congress known as the Webb-Kenyon Law, that law is in contravention of the interstate commerce clause of the Constitution of the United States and of the Fifth and Fourteenth Amendments to the Constitution. This request for a peremptory instruction for the defendant was refused. The court instructed the jury that if it believed from the evidence that the Adams Express Company, as a common carrier, brought any spirituous, vinous or malt liquors into Whitley County, being local option territory in the State of Kentucky, and there delivered the same to the persons named in the indictment, then the defendant was guilty and its punishment should be fixed at not less than fifty dollars nor more than one hundred dollars; and that upon the whole case if they had any reasonable doubt of the guilt of the Company they should find a verdict of not guilty. The defendant duly excepted to the giving of these instructions and to the refusal to grant its prayer for a peremptory instruction. The Company was convicted, and fined in the sum of fifty dollars. That amount not being sufficient to give the Court of Appeals of the State jurisdiction, a writ of error was taken from this court to the Circuit Court of Whitley County.

The Kentucky statute now under consideration was before this court in the case of *Louis. & Nash. R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70. In that case it was held that, as applied to interstate shipments, the statute was void as an attempt by the State to regulate commerce among the States. Such must still be the fate of the statute unless it is the effect of the Act of Congress of March 1,

1913, c. 90, 37 Stat. 699, known as the Webb-Kenyon Act, to require a different result. That Act provides:

"An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases.

"Be it enacted, &c., that the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, is hereby prohibited."

Before entering upon a consideration of the meaning of this act, it is well to have in mind certain principles of constitutional law and, as well, certain legislation of Congress upon this subject in force at the time when the Webb-Kenyon Act was passed. The Constitution of the United States grants to Congress authority to regulate commerce among the States, to the exclusion of state control over the subject. This power is comprehensive, and subject to no limitations, except such as are found in the Constitution itself. This general principle runs through all the cases decided in this court considering the matter, and has never been questioned since Chief Justice Marshall, for the court, delivered the judgment in *Gibbons* v. *Ogden*, 9 Wheat. 1. Applying this general principle,

it was held by this court in *Leisy* v. *Hardin*, 135 U. S. 100, that the State of Iowa, in the absence of congressional permission, had no authority to prohibit the sale of liquor in original packages in the hands of importers from other States in that State, and the court there declared that, whatever the individual views of its members might be concerning the deleterious qualities of certain articles of commerce, when such articles were recognized by Congress as legitimate subjects of interstate commerce such interstate traffic could not be controlled by the laws of the State amounting to regulations thereof. In the course of the consideration of this case, this court said (pp. 123, 124):

"The responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

After the decision of *Leisy* v. *Hardin*, Congress passed the Wilson Act of 1890, 26 Stat. 313. That act made intoxicating liquors transported in interstate commerce subject to the exercise of the police power of the States upon arrival in the State, in the same manner as though such liquors had been produced in the State or Territory into which the same were shipped. The constitutionality of that act was attacked and came under consideration in this court in *In re Rahrer*, 140 U. S. 545, where the law was upheld. In affirming the right of Congress to pass the statute, this court said (p. 561):

"In so doing, Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt state laws. It has taken its own course and made its own regulation, applying to

these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property. . . .

"(P. 564) Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

In *Rhodes* v. *Iowa*, 170 U. S. 412, it was held that the Wilson Act did not have the effect to permit interstate shipments of liquor to come under the operation of the liquor laws of the State until after their delivery to the consignee, and that one receiving liquor shipped in interstate commerce obtained the right to use the same, although he no longer had the right to sell it free from the restrictions imposed by the laws of the State. And see *Vance* v. *Vandercook*, 170 U. S. 438.

From what we have said, it follows that, before the passage of the Webb-Kenyon Act, while the State in the exercise of its police power might regulate the liquor traffic after the delivery of the liquor transported in interstate commerce, there was nothing in the Wilson Act to prevent shipment of liquor in interstate commerce for the use of the consignee, provided he did not undertake to sell it in violation of the laws of the State. The history of the Webb-Kenyon Act shows that Congress deemed this situation one requiring further legislation upon its part, and thereupon undertook, in the passage of that Act, to deal further with the subject, and to extend the prohibitions against the introduction of liquors into the States by means of interstate commerce. That the act did not assume to deal with all interstate commerce shipments of intoxicating liquors into prohibitory territory in the States

is shown in its title, which expresses the purpose to divest intoxicating liquors of their interstate character in certain cases. What such cases should be was left to the text of the act to develop.

It is elementary that the first resort, with a view to ascertaining the meaning of a statute, is to the language used. If that is plain there is an end to construction and the statute is to be taken to mean what it says.

Extraneous words omitted, this statute reads: "The shipment or transportation of . . . intoxicating liquors from one State . . . into another State . . . which intoxicating liquor is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is hereby prohibited." It would be difficult to frame language more plainly indicating the purpose of Congress not to prohibit all interstate shipment or transportation of liquor into so-called dry territory and to render the prohibition of the statute operative only where the liquor is to be dealt with in violation of the local law of the State into which it is thus shipped or transported. Such shipments are prohibited only when such person interested intends that they shall be possessed, sold or used in violation of any law of the State wherein they are received. Thus far and no farther has Congress seen fit to extend the prohibitions of the act in relation to interstate shipments. Except as affected by the Wilson Act, which permits the state laws to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon Act, which prohibits the transportation of liquors into the State to be dealt with therein in violation of local law, the subject-matter of such interstate shipment is left untouched and remains within the sole jurisdiction of Congress under the Federal Constitution.

It becomes necessary, therefore, to inquire whether a

shipment of the character here in question comes within the terms of the Webb-Kenyon Act, because of the purpose to use the liquor in violation of the law of the State of Kentucky. The stipulation upon which the case was tried shows that the liquor was bought and paid for in Tennessee, and was shipped from that State into the State of Kentucky for the personal use of the consignee without any intention on his part to dispose of it contrary to the law of the State.

The case under review was one of nineteen tried under the same stipulation. In one of them the fine imposed was large enough to give jurisdiction to the Court of Appeals of Kentucky, and the case before that court is found in 154 Kentucky, 462. Considering whether such shipment was in violation of the law of the State, that court, after commenting upon the fact that the stipulation showed that the liquors were intended by the consignees for their personal use and were not intended by them to be sold and were not sold, contrary to law, further said:

"This being the purpose for which the liquor was intended to be received, possessed and used, it is clear that the consignees who received from the carrier the liquor did not, in so doing, violate or intend to violate any law of this state, because there is not and never has been any law of this state that prohibited the citizen from purchasing, where it was lawful to sell it, intoxicating liquor for his personal use, or from having in his possession for such use liquor so purchased. *Calhoun* v. *Commonwealth*, 154 Kentucky, 70; *Martin* v. *Commonwealth*, 153 Kentucky, 784. As said in *Commonwealth* v. *Campbell*, 133 Kentucky, 50:

"'The history of our state from its beginning shows that there was never even the claim of a right on the part of the Legislature to interfere with the citizen using liquor for his own comfort, provided that in so doing he committed no offense against public decency by being intoxicated;

and we are of opinion that it never has been within the competency of the Legislature to so restrict the liberty of the citizen, and certainly not since the adoption of the present Constitution. The Bill of Rights, which declared that among the inalienable rights possessed by the citizens is that of seeking and pursuing their safety and happiness, and that the absolute and arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority, would be but an empty sound if the Legislature could prohibit the citizen the right of owning or drinking liquor, when in so doing he did not offend the laws of decency by being intoxicated in public. . . . Therefore the question of what a man will drink, or eat, or own, provided the rights of others are not invaded, is one which addresses itself alone to the will of the citizen. It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society.'"

And further,

"It, therefore, appears that the issue in this case really comes down to this, was the liquor involved in this transaction intended by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of this state? It is shown by the agreed state of facts, when considered in the light of the Constitution and laws of the state, and the opinions of this court, that it was not."

In the subsequent case of *Adams Express Company* v. *Commonwealth*, 160 Kentucky, 66, it appeared that the liquor was intended by the consignee to be sold in violation of the law of the State, and was so sold, and the court held that in such case the carrier was bound before the delivery of the whiskey, to be circumspect and to use

ordinary care to learn the purpose for which it was to be used, and if, acting in good faith upon reasonable grounds, the carrier was misled, it was not liable, otherwise it was; and that the question was one of fact for the jury. The court, however, expressly adhered to its ruling in *Express Co.* v. *Commonwealth*, 154 Kentucky, *supra*, under facts such as were there presented, and such as appear in the case now under consideration.

It therefore follows that, inasmuch as the facts of this case show that the liquor was not to be used in violation of the laws of the State of Kentucky, as such laws are construed by the highest court of that State, the Webb-Kenyon Law has no application and no effect to change the general rule that the States may not regulate commerce wholly interstate. As it appears that the conviction in this case was for an interstate transportation, not prohibited by the Webb-Kenyon Act, the rights under the interstate commerce clause of the Constitution expressly set up by the Express Company were denied by the judgment of conviction in the Circuit Court of Whitley County, and that judgment must accordingly be reversed.

Reversed.